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SELECTED CASES
IN
CONSTITUTIONAL LAW



BY

H. EDGAR BARNES

AND

BYRON A. MILNER

**Members of the Philadelphia Bar and Lecturers in the
University of Pennsylvania**

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Preface

This volume contains a collection of cases intended primarily for the use of students in the study of Government and Constitutional Law. For some years, the compilers have used the standard text books on Government in teaching these subjects, and after careful consideration, finally came to the conclusion that better results were obtained by use of the Case Book method.

The opinions of the United States Supreme Court not only offer instructive and interesting reading, but are the best and most authoritative treatises upon the interpretation of the Constitution and the definition of the extent of State and Federal power. The facts of the cases present real problems which have actually come before the Courts for consideration and solution. We are convinced that when a principle of Constitutional Law is coupled with the actual facts of a case, the student not only more readily comprehends it, but retains it longer in his memory.

If the student is referred to the original reports of cases, he will find difficulty in grasping the meaning of them because of the great amount of technical detail. The compilers have made a careful selection of the leading cases on the great constitutional questions, including the more important recent decisions of the Supreme Court. The endeavor has been to present a concise statement of the facts of each case, and to include those portions of the opinion of the Court, which bear upon the principle of Constitutional Law under consideration. Matters of pleading and unimportant technical detail have been eliminated. The cases are in many instances annotated by explanatory matter and notes, and there have been included in the Appendix the important State and Federal statutes mentioned in the cases, as well as other statutes of interest to the student, such as the Federal Trade Commission Act, the Clayton Act and Income Tax Law.

H. EDGAR BARNES,
BYRON A. MILNER.

Philadelphia, Pennsylvania.

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Constitution of the United States

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SEC. 2. The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

[Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.]¹ The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative, and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

¹ The clause included in brackets is amended by the fourteenth amendment, second section.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. 3: [The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.]¹

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SEC. 4. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

¹This clause included in brackets is amended by Seventeenth Amendment.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

SEC 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill, shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be ap-

proved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SEC. 8. The congress shall have power :—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities, and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money, to that use, shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings;—And

To make all laws which shall be necessary and proper for carry-

ing into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SEC. 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder or *ex post facto* law, shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SEC. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payments of debts; pass any bill of attainder; *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the

term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:—

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose, by ballot, one of them for president; and if no person have a majority, then from the five highest on the list, the said house shall, in like manner, choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice-president.]¹

The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

¹ This clause has been superseded by the twelfth amendment.

The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—

“I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States.”

SEC. 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law; but the congress may by law vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

SEC. 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SEC. 4. The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the con-

gress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SEC. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which

he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SEC. 3. New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

SEC. 4. The United States shall guaranty to every state in this union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; *provided*, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States, under this constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be

bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

[Signed by]

GO. WASHINGTON, *President,*
and Deputy from Virginia,
and by thirty-nine delegates.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

SECTION 1. The electors shall meet in their respective states and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate:—the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted;—the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SEC. 3. No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SEC. 2. The congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Note.—The Constitution was ratified by the thirteen original States in the following order: Delaware, December 7, 1787, unanimously; Pennsylvania, December 12, 1787, vote 46 to 23; New Jersey, December 18, 1787, unanimously; Georgia, January 2, 1788, unanimously; Connecticut, January 9, 1788, vote 128 to 40; Massachusetts, February 6, 1788, vote 187 to 168; Maryland, April 28, 1788, vote 63 to 12; South Carolina, May 23, 1788, vote 149 to 73; New Hampshire, June 21, 1788, vote 57 to 46; Virginia, June 25, 1788, vote 89 to 79; New York, July 26, 1788, vote 30 to 28; North Carolina, November 21, 1789, vote 193 to 75; Rhode Island, May 29, 1790, vote 34 to 32.

Amendments I to X inclusive were declared in force December 15, 1791. XI was declared in force January 8, 1798. XII, regulating elections, was ratified by all the States except Connecticut, Delaware, Massachusetts, and New Hampshire, which rejected it. It was declared in force September 28, 1804. XIII. The emancipation amendment was ratified by 31 of the 36 States; rejected by Delaware and Kentucky; not acted on by Texas; conditionally ratified by Alabama and Mississippi. Proclaimed December 18, 1865. XIV. Reconstruction amendment was ratified by 23 Northern States; rejected by Delaware, Kentucky, Maryland and 10 Southern States, and not acted on by California. The 10 Southern States subsequently ratified under pressure. Proclaimed July 28, 1868. XV. Negro citizenship amendment was not acted on by Tennessee, rejected by California, Delaware, Kentucky, Maryland, New Jersey, and Oregon; ratified by the remaining 30 States. New York rescinded its ratification January 5, 1870. Proclaimed March 30, 1870. XVI was proclaimed in force February 25, 1913. XVII was proclaimed in force May 31, 1913.

CHAPTER I.

The Executive Department

Section 1.

THE PRESIDENT'S POWER OF APPOINTMENT.**MARBURY v. MADISON.**

1 CRANCH, 137. 1803.

This was an original proceeding brought in the Supreme Court of the United States for a mandamus commanding James Madison, Secretary of State under President Jefferson, to deliver a commission to William Marbury, the plaintiff, as a justice of the peace for the District of Columbia. The plaintiff claimed to have been appointed by President Jefferson's predecessor, President John Adams. The particular act of Congress upon which the plaintiff relied in bringing this action was the Judiciary Act of 1789, which authorized the Supreme Court of the United States to issue writs of mandamus to persons holding office under the authority of the United States.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court.

"In the order in which the court has viewed this subject, the following questions have been considered and decided. 1st. Has the applicant a right to the commission he demands? 2nd. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3rd. If they do afford him a remedy, is it a mandamus issuing from this court?"

The first object of inquiry is,

1st, Has the applicant a right to the commission he demands?

His right originates in an Act of Congress passed in February, 1801, concerning the District of Columbia.

After dividing the district into two counties, the 11th section of this law, enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the President of the United States shall, from time to time, think expedient, to continue in office for five years."

It appears from the affidavits, that in compliance with this law, a commission for William Marbury, as a justice of the peace, for the county of Washington, was signed by John Adams, then President of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which being completed, became his property.

The second section of the second article of the Constitution declares, that, "the president shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for." The third section declares, that "he shall commission all the officers of the United States."

An Act of Congress directs the Secretary of State to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President by and with the consent of the Senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations; 1st, the nomination. This is the sole act of the President, and is completely voluntary. 2nd, the appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate. 3rd, the commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all officers of the United States."

This is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it.

The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when

the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission.

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

The commission being signed, the subsequent duty of the Secretary of State is prescribed by law, and is not to be guided by the will of the President. He is to affix the seal of the United States to the commission and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts in this respect, under the authority of the law and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

It is not necessary that livery should be made personally to the grantee of the office. It never is so made. The law would seem to contemplate that it should be made to the Secretary of State, since it directs the Secretary to affix the seal to the commission after it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the Secretary for the purpose of being sealed, recorded and transmitted to the party.

To withhold his (*Marbury's*) commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second enquiry, which is,

2. If he has a right and that right has been violated, do the laws of his country afford him a remedy?

Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

It remains to be inquired whether, thirdly, He is entitled to the remedy for which he applies. This depends on, first, the nature of the writ applied for, and, secondly, the power of this court.

Blackstone, in the third volume of his commentaries, page 110, defines a mandamus to be, "a command issuing in the king's name from a court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice. * * * * This, then, is a plain

case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired, whether it can issue from this court.

"The act to establish the judicial courts of the United States authorizes the Supreme Court 'to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.'

"The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign. * * * *

* * * * *

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of the conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, it yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers with narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. * * * *

Thus, the particular phraseology of the Constitution of the United

States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule (for a mandamus) must be discharged.

Section 2.

THE PRESIDENT'S DIPLOMATIC AND TREATY-MAKING POWERS.

JONES *v.* UNITED STATES.

137 U. S., 202. 1890.

This was an indictment, found in the District Court of the United States for the District of Maryland, alleging that Henry Jones, late of that District, on September 14, 1889, at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any particular state or district of the United States, murdered one Thomas N. Foster. Navassa Island was situated in the Caribbean Sea and contained a deposit of guano. An Act of Congress relating to the discovery and occupation by citizens of the United States of guano islands not within the lawful jurisdiction of any other government, provided that the President should have the power to extend the jurisdiction of the United States over the islands so occupied. Evidence was introduced to show that the executive branch of the federal government had extended the jurisdiction of the United States to Navassa Island. The District of Maryland was the District of the United States into which Jones was first brought from Navassa Island. In the District Court, the Government sought to establish the right of the federal court to try Jones for the murder committed on the above mentioned island under the Revised Statutes of the United States, Section 1039, providing for the punishment of murder committed "within any fort, arsenal, dock-yard, magazine, or any other place or district or country under the exclusive jurisdiction of the United States." Jones questioned the validity of the Act of Congress concerning guano islands, especially the power of the President under the Act. Jones was convicted in the District Court and sentenced to death. An appeal was taken to the Supreme Court of the United States.

MR. JUSTICE GRAY delivered the opinion of the court.

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens, or subjects of one

nation, in its name, and by its authority or with its assent, take and hold actual continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. * * * *

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. * * * *

(In *Williams v. Suffolk Ins. Co.*) this court held that the action of the executive department, on the question to whom the sovereignty of those islands belonged, was binding and conclusive upon the courts of the United States, saying: "Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union. In the present case, as the executive in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands, the fact must be taken and acted on by this court as thus asserted and maintained." 13 Pet. 420.

All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings. * * * *

In the case at bar, the indictment alleges that the Island of Navassa, on which the murder is charged to have been committed, was at the time under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, and recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and recognized and considered by the United States as appertaining to the United States and in the possession of the United States under those laws.

These allegations, indeed, if inconsistent with facts of which the court is bound to take judicial notice, could not be treated as conclusively supporting the verdict and judgment. But, on full consideration of the matter, we are of opinion that those facts are quite in accord with the allegations of the indictment.

The power conferred on the President of the United States by Section 1 of the Act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President.

Conviction in the lower court is affirmed.

Section 3.

T. . PRESIDENT'S EXECUTIVE POWER.

IN RE NEAGLE.

135 U. S., I. 1890.

David Neagle, a deputy marshal of the United States for the District of California, was brought by writ of *habeas corpus* before the United States Circuit Court upon a petition that he was being unlawfully imprisoned by the State of California upon the charge of having murdered one David S. Terry. Neagle claimed that the killing of Terry was done by him in pursuance of his duty as a deputy marshal in defending the life of Mr. Justice Field, a justice of the United States Supreme Court, while the latter was discharging his duties as circuit judge of the Ninth Circuit. The facts showed that there was a settled purpose on the part of Terry and his wife to murder Mr. Field on his official visit to California in 1889, because of some animosity due to a judicial decision rendered by him. Neagle had been appointed by the Attorney-General of the United States, acting for the President, and the United States, to guard Mr. Field against attack. Terry met Mr. Field upon a railroad train and made a murderous attack upon him, which Neagle had reason to believe would result in his death unless he interfered, whereupon he shot and killed Terry. Neagle was arrested and imprisoned in the county jail at San Joaquin county, California, charged with murder.

The United States Circuit Court decided "that the prisoner was in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," and it was therefore ordered that he be dis-

charged from custody. An appeal was then taken to the Supreme Court of the United States by the sheriff of San Joaquin county, California, from whose custody Neagle was discharged by the order of the Circuit Court.

MR. JUSTICE MILLER ruled as follows:

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal of the Northern District of California, and the Attorney-General, and the District Attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the Attorney-General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and ~~de~~ ^{peace} of Mr. Justice Field. * * * *

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California, are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States Court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed upon him by the section of the Revised Statutes which we have recited in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But all these questions being conceded, it is urged against the

relief sought by this writ of *habeas corpus*, that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.
* * *

The same answer is given in the present case. To the objection made in argument, that the prisoner is discharged by this writ from the power of the State court to try him for the whole offence, the reply is, that if the prisoner is held in the State court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the State court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impanelled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offence to be submitted to a jury, and if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorising his discharge from the custody of the sheriff of San Joaquin County.

Note.—There were many facts and circumstances in connection with the case of *In Re Neagle* which possess great interest because of the persons involved therein, and yet are of such character as would not be contained in a law report. Mr. Justice Field and David Terry both arrived in California during the days of the gold fever. They both practiced law and both entered into politics. David Terry was elected Justice of the Supreme Court of California in 1855 and resigned on September 12, 1859. Stephen J. Field was elected a Justice of the same court and became Chief Justice upon Judge Terry's resignation. The two men were associates, therefore, upon the bench during two years. Judge Terry resigned from the bench to enter the Confederate Army during the Civil War, and after the war was ended he returned to the practice of law in California. Judge Field in the meantime had been appointed by President Lincoln an Associate Justice of the United States Supreme Court. Judge Terry and his wife were interested as defendants in a bitter litigation in the United States Circuit Court in California in the years 1883 to 1888. On September 3, 1888, an opinion unfavorable to Terry and his wife was rendered by Justice Field. At its conclusion Mrs. Terry arose in the court room and cried aloud that Justice Field had been bought, and wanted to know the price he had sold himself for. Justice Field directed the marshal to remove her from the court room. Thereupon Terry attacked the marshal, and drew a bowie-knife upon him. For this conduct Terry and his wife were sentenced to imprisonment for contempt of court. From that time until his death the denunciations by Terry and his wife of Mr. Justice Field were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill Judge Field. So much impressed were the friends of Judge Field, and of public justice, both in California and in Washington, with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the Attorney-General of the United States suggesting the propriety of his furnishing some protection to the Judge while in California. This resulted in a correspondence between the Attorney-General of the United States, the District Attorney, and the marshal of the Northern District of California on that subject, the result of which was that Mr. Neagle was appointed a deputy marshal for the Northern District of California, and given special instructions to attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Judge Field went from San Francisco to Los Angeles to hold the Circuit Court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and entered the train to return with him to San Francisco. While the sleeping car, in which were Justice Field and Mr. Neagle, stopped a moment in the early morning at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace

officers could be found at Lathrop, where the train stopped for breakfast, and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge Field. This resulted in no available aid to assist in keeping the peace.

When the train arrived, Neagle informed Judge Field of the presence of Terry on the train, and advised him to remain and take his breakfast in the car. This the Judge refused to do, and he and Neagle got out of the car and went into the dining room, and took seats beside each other in the place assigned them by the person in charge of the breakfast room. The occurrences following hereupon were testified to by Judge Field as follows: "A few minutes afterwards Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly, and went out in great haste. I afterwards understood, as you heard here, that she went for her satchel. Judge Terry walked past, opposite to me, and took his seat at the second table below. The only remark I made to Mr. Neagle was: 'There is Judge Terry and his wife.' He remarked: 'I see him.' Not another word was said. I commenced eating my breakfast. It seems, however, that he came round back of me—I did not see him—and he struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard 'Stop! stop!' cried by Neagle. Of course, I was for a moment dazed by the blows. I turned my head round, and I saw that great form of Terry's, with his arm raised, and his fists clenched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way, as though to strike the side of my temple, when I heard Neagle cry out, 'Stop! stop! I am an officer.' Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks that I did; but I did not. I looked around, and saw Terry on the floor. I looked at him, and saw that peculiar movement of the eyes that indicates the presence of death. Of course, it was a great shock to me. It is impossible for any one to see a man in the full vigor of life, with all those faculties that constitute life, instantly extinguished, without being affected; and I was. I looked at him for a moment, then rose from my seat, went around, and looked at him again, and passed on." Neagle was arrested immediately, as was also Justice Field, though the latter was soon released, by the authorities of the State of California. The result of Neagle's effort to obtain his release resulted in the now famous case.

IN RE DEBS.

158 U. S., 564. 1894.

In May of 1894, there arose a dispute between the Pullman Palace Car Company and its employees which resulted in a strike

of the employees of the company. The officers of the railway union tried to force a settlement of differences by creating a boycott against the cars of the company, and had prevented certain railroads running out of Chicago from operating their trains and were combining to extend such boycott by causing strikes among employees of all railroads hauling Pullman cars. A bill of complaint was filed on July 2, 1894, by the United States in the Circuit Court of the United States in Illinois against Eugene Debs and others who were the officers and leaders of the labor organizations of the employees. The complaint was that twenty-two railroads were engaged in interstate commerce, into and out of the city of Chicago; that each of the roads was under contract to carry the mails, and were post roads of the government; that they were required also to carry the troops and military forces of the United States. An injunction was issued by the court restraining the defendants and all persons conspiring with them from interfering, hindering or obstructing the business of the railroads as interstate carriers and carriers of mail. This injunction was duly served upon the defendants. Subsequently, on July 17, 1894, an attachment for contempt of court was issued against the officers of the railway union and others because of their disobedience to the said order of the court, and after a hearing they were sentenced to imprisonment. Having been committed to jail, they applied to the Supreme Court for a writ of *habeas corpus* in order to test the legality of their confinement.

MR. JUSTICE BREWER delivered the opinion of the court:

Under the power vested in Congress to establish postoffices and post roads, Congress has, by a mass of legislation, established the great postoffice system of the country, with all its details of organization, its machinery for the transaction of business, defining what shall be carried and what not, and the prices of carriage, and also prescribing penalties for all offenses against it. Obviously these powers given to the national government over interstate commerce, and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in full discharge of its duty to regulate interstate commerce and carry the mails. As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. * * * Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? * * * The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the

national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia are at the service of the nation to compel obedience to its laws. * * * So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. * * * Summing up our conclusion, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; * * * that to it is committed power over interstate commerce and the transmission of the mail; * * * that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions. * * * *

The petition for a writ of *habeas corpus* is denied.

Section 4.

THE PRESIDENT'S PARDONING POWER.

EX PARTE GARLAND.

4 WALLACE, 333. 1866.

The petitioner, A. H. Garland,* was an attorney and a citizen of Arkansas. In May, 1861, Arkansas purported to withdraw from the Union and attach itself to the Confederate States. The petitioner followed the State and was one of its representatives in the Congress of the Confederacy. In July, 1865, he received from the President of the United States a full pardon for all offences committed by his participation, direct or implied, in the rebellion. On July 2, 1862, Congress passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit in the United States. On January 24, 1865, Congress, by a supplementary act, extended its provisions to attorneys of the courts of the United States. One of the sentences in the prescribed oath was, "that he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility to the United States." Garland produced his pardon and petitioned the Supreme Court for leave to practice as an attorney before the court.

MR. JUSTICE FIELD delivered the opinion of the court.

The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought

* The petitioner, A. H. Garland, was afterwards Attorney-General of the United States in the Cabinet of President Cleveland.

within the further inhibition of the Constitution against the passage of an *ex post facto* law. * * * *

The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorney and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. * * * *

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held in the case of *Cummings v. The State of Missouri* (4 Wall. 277), and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.

This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." Article II, Sec. 2.

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation; it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.

The pardon produced by the petitioner is a full pardon "for all offences by him committed, arising from participation, direct or implied, in the Rebellion," and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offence, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted.

Note.—See also *Cummings v. Missouri*, 4 Wall, 227; *Ex parte Wells*, 18 Howard, 307, for further cases upon the same principle.

Section 5.**THE PRESIDENT'S MILITARY POWER.****LUTHER v. BORDEN.**

7 HOWARD, 1. 1848.

At the time of the American Revolution, Rhode Island did not, as did the other States, adopt a new Constitution, but continued the form of government established by the charter of Charles II in 1663, making only such alterations by acts of the Legislature as were necessary to adapt it to its conditions and rights as an independent State. Many citizens became dissatisfied with the charter government. A convention was called to draw up a new Constitution, to be submitted to the people of the State and a vote taken upon it. On the return of the votes, the convention declared that the Constitution was adopted and ratified by a majority of the people of the State. Elections for Governor, members of the Legislature and other offices were then held. These officers assembled and proceeded to organize the new government. The charter government did not acquiesce in the proceedings, but passed laws declaring void the new Constitution, put the State under martial law and called out the militia. The house of the plaintiff, Martin Luther, was broken into in order to arrest him for supporting the authority of the new government. This suit was an action of trespass by him against the defendants, who were in the military service of the charter government. The defence was that the acts were justified on the ground of the insurrection and because they were in the military service of the State. The plaintiff replied that the trespass was committed by the defendants of their own proper wrong, as the charter government no longer existed.

The issue was then raised as to which government was the legally constituted one. A verdict in favor of the old government and the defendants in this suit was rendered in the United States Circuit Court. An appeal was taken to the Supreme Court.

CHIEF JUSTICE TANEY delivered the opinion.

The question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more than one of the cases evidence was offered on the part of the defence sim-

ilar to the testimony offered in the Circuit Court, and for the same purpose, that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavoring to support it.

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. * * * *

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the council of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue. * * * Congress was not called upon to decide the controversy. Yet the right to decide was placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court

to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts, when the conflict is raging—if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed

opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign State of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused, if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals.

Judgment of the Circuit Court is affirmed.

CHAPTER II.

The Legislative Department

Section 1.

POWER OF CONGRESS OVER TAXATION.

Sub-Section A.

EXTENT OF THE FEDERAL POWER.

THE COLLECTOR *v.* DAY.

11 WALLACE, 113. 1870.

This suit was instituted by J. M. Day against the Collector of Internal Revenue of the United States to recover the sum of sixty-one dollars and fifty cents, which had been assessed as a tax upon his salary as a judge of the Court of Probate and Insolvency for the County of Barnstable, Massachusetts, for the year 1866 and 1867. The salary was fixed by law and was paid out of the state treasury. Day paid the tax under protest and instituted this suit to recover it. It was contended that the Act of Congress levying the tax was unconstitutional as the Federal Government could not impose a tax upon the salary of the judicial officer of a State.* A judgment was given in favor of Day in the lower court, whereupon an appeal was taken to the Supreme Court of the United States.

MR. JUSTICE NELSON delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State.

In *Dobbins v. the Commissioners of Erie County*, 16 Peters, 435, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the

*The Acts passed in 1864, 1865, 1866, 1867 provided: There shall be levied collected and paid annually upon the gains, profits and income of every person residing in the United States,—whether derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment or vocation, carried on in the United States or elsewhere, or from any other source whatsoever, a tax of five (5) per centum on the amount so derived, over \$1,000.

Compare with Income Tax Law of August 15th, 1894, stated in case of *Pollock v. Farmers' Loan and Trust Company*, *infra* page 57.

Also compare Income Tax Law of October 3rd, 1913. See digest thereof in Appendix.

United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of *McCulloch v. Maryland*, 4 Wheat. 316, and *Weston v. Charleston*, 2 Peters, 449, were referred to as settling the principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers."

The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch v. Maryland*, 4 Wheat. 432. "If the States," he observes, "may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax the patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." "This," he observes, "was not intended by the American people. They did not design to make their government dependent on the States." Again, (*Ib.* 427.) "That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied." And, in *Weston v. The City of Charleston*, 2 Peters, 466, he observes. "If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it which the will of each State and corporation may prescribe." * * * *

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted,

or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States. * * * *

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of the governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States. * * * *

And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law

of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the *Veazie Bank v. Fenno*, 8 Wall, 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch v. Maryland*, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject, at all, to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain.

Judgment affirmed.

Note.—In *U. S. v. Baltimore & Ohio Railroad Co.*, 17 Wallace 322 (1873) the United States sought to collect a tax under the Federal Internal Revenue Act of 1864, as amended, on interest payable by the Baltimore & Ohio Railroad Company to the City of Baltimore. The City of Baltimore, with a view to aid its commercial prosperity, loaned the railroad \$5,000,000 to aid it in running its line into the city, and took as security a mortgage on the railroad, on which the interest taxed was paid. The Supreme Court held that this amounted to a tax on the municipal revenues and not a tax upon the railroad and could not be collected.

In *South Carolina v. U. S.* 199 U. S. 437 (1905) the same court held that the United States may exact the license taxes prescribed by the Internal Revenue Laws for dealers in intoxicating liquors from a State which in the exercise of its sovereign power has taken charge of the business of selling such liquors. The court reasoned that the exemption of the State property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency, but when a State goes outside of its purely governmental functions and engages in the business of making and selling things it becomes subject to the Federal taxing power. If this were not so the federal taxing power would be largely crippled by the absorption by the States of certain business, such as public utilities, tobacco business, etc.

VEAZIE BANK *v.* FENNO.

8 WALLACE, 533. 1869.

Congress passed an act on July 13, 1866, which provided, "That every national banking association, State bank or State banking association shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them after the 1st day of August, 1866." Under this act a tax of ten per cent. was assessed upon the Veazie Bank, for its notes issued for circulation, after the day named in the act. The bank was a corporation chartered under the laws of the State of Maine, with authority to issue bank notes for circulation, and the notes on which the tax imposed by the act was collected, were issued under this authority. The bank paid the tax under protest. The Circuit Court of Maine, in which action was brought to recover the amount of the tax paid, being divided in its opinion, the case was brought to the Supreme Court upon the question of the constitutionality of the act (1) That it was a direct tax and had not been apportioned according to population (2) That the act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

The opinion was delivered by CHIEF JUSTICE CHASE.

* * * * Much diversity of opinion has always prevailed upon the question, what are direct taxes. Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. * * * * We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority. And, considered in this light, the meaning and application of the rule, as to direct taxes, appeals to us quite clear. It is, as we think, distinctly shown in every act of Congress on the subject. In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States, according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act fixing its total sum. * * * * This review shows that personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax. * * * * It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes. * * * * The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. * * * * Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by tax-

ation, must be held to have no authority, to lay and collect? We do not say there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property. But in the case before us, the object of taxation is not the franchise, but property created or contracts made and issued under the franchise, or power to issue bank bills. * * * * It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress. The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot for that reason only be pronounced contrary to the Constitution. * * * *

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued

on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will perhaps satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain by suitable enactments, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country would be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration.

Sub-Section B

LIMITATIONS OF THE STATE POWER.

M'CULLOCH *v.* MARYLAND.

4 WHEATON, 316. 1819.

In 1816 Congress incorporated "*The Bank of the United States.*" (This was the second United States Bank). In 1817 a branch of the bank was established in Baltimore, Maryland. On February 11, 1818, the State of Maryland passed an act imposing a tax "on all Banks, or branches thereof, in the State of Maryland, not chartered by the legislature." No notes were to be issued by such banks except on stamped paper. M'Culloch, the cashier of the Baltimore branch of the United States Bank, issued certain notes without using stamped paper. The State thereupon brought suit in the courts of Maryland against M'Culloch, to recover the taxes claimed to be due under the statute and the penalties for the violation of the statute.

(The statute provided that in case it was violated certain penalties should be imposed.) The State court gave judgment against M'Culloch, but he claimed that the State statute was unconstitutional and appealed to the Supreme Court of the United States.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court.

"1. The first question made in the cause, is, has Congress power to incorporate a bank?"

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted

to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. * * * *

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and purse, all the external relations, and no inconsiderable portion of the industry of the nation,

are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied that the powers given to the government imply the ordinary means of execution. That, for example of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means of performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed

on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof." * * * *

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means, calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this

description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view. * * * *

This clause, as constructed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:—

1. The clause is placed among the powers of Congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. * * * *

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the power it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. * * * *

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States; and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deducted as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st, That a power to create implies a power to preserve. 2d, That a power to destroy if wielded by a different hand is hostile to, and incompatible with these powers to create and preserve. 3d, That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion, and is no longer to be considered questionable.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

We find then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers.

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to cre-

ate; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

We are unanimously of the opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

Note.—Congress has by statute permitted the taxation by States of national bank notes and shares of stock in national banks under certain prescribed conditions, as follows:

Be it enacted, etc., That circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency and gold, silver or other coin shall be subject to taxation as money on hand or on deposit under the laws of any State or Territory: *Provided*, That any such taxation shall be exercised in the same manner and at the same rate that any such State or Territory shall tax money or currency circulating as money within its jurisdiction.

Act Aug. 13, 1894, c. 281, Section 1, 28 Stat. 278.

Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

Act June 3, 1864, c. 106, Section 41, 13 Stat. III. Act Feb. 10, 1868, c. 7, 15 Stat. 34.

Sub-Section C.

DIRECT AND INDIRECT TAXES.

HYLTON *v.* UNITED STATES.

3 DALLAS, 171. 1796.

This suit was originally brought in the Circuit Court for the District of Virginia, by the United States against one Daniel Hylton to recover the penalty imposed by Act of Congress of June 5, 1794, for not entering and paying the duty on a number of carriages for

the conveyance of persons, which he kept for his own use. Hylton defended the suit on the ground that the tax was unconstitutional and void. The argument turned entirely upon the point whether the tax on carriages kept for private use was a direct tax. If it was not a direct tax, it was admitted to be rightly laid, within the first clause of the 8th section of Article I of the Constitution, which declares, "All duties, imposts and excises shall be uniform throughout the United States." If it were a direct tax, it was unconstitutional, under another clause of the same section of the Constitution, which provides, "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration of the inhabitants of the United States." The Circuit Court was divided in its opinion, whereupon Hylton confessed judgment as a foundation for his appeal to the Supreme Court of the United States.

The court delivered their opinions seriatim.

The following opinion was delivered by MR. JUSTICE CHASE:

I think, an annual tax on carriages for the conveyance of persons may be considered as within the power granted to Congress to lay duties. The term duty is the most comprehensive, next to the general term tax; and practically in Great Britain, whence we take our general ideas of taxes, duties, imposts, excises, customs, etc., embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only. It seems to me, that a tax on expense is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner. I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation or poll tax, simply, without regard to property, profession or any other circumstance; and a tax on land. I doubt, whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

I am for affirming the judgment of the Circuit Court.

POLLOCK *v.* FARMERS' LOAN AND TRUST COMPANY.

157 U. S., 429; AND 158 U. S., 601. 1895.

This suit was instituted by Pollock and other persons, stockholders in the Farmers' Loan and Trust Company, to restrain the officers and directors of the company from paying to the United States the taxes assessed upon the net profits of the company and the incomes of all trust estates which the company held as trustee, exceeding \$4000. The bill charged that the Act of Congress of August 15, 1894, relating to the collection of an income tax was unconstitutional and void (1) because it was a direct tax on

real estate by being imposed on rents, issues and profits of real estate; also that it was a direct tax on personal property and was not *apportioned* among the several States as required by the Constitution. (2) If not a direct tax, nevertheless it was unconstitutional since it was not *uniform* as required by the Constitution, as incomes under \$4000 were exempted from taxation. The Act of Congress provided as follows: "There shall be assessed, levied, collected and paid annually upon the gains, profits and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment or vocation carried on in the United States, or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars," etc.

It was held that the statute was unconstitutional so far as it levied a tax on the rents or income of real estate (157 U. S., 429). On other questions involved in the case the court was unable to decide because the judges were equally divided in opinion. A second hearing was granted by the court, (158 U. S., 601).

The opinion was delivered by CHIEF JUSTICE FULLER.

* * * * As heretofore stated, the Constitution divided Federal taxation into two great classes, the class of direct taxes, and the class of duties, imposts, and excises; and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes apportioned among the several States in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution, and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived; that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the

enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution. * * * *

We know of no reason for holding otherwise than that the words "direct taxes," on the one hand, and "duties, imposts and excises," on the other, were used in the Constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified. * * * *

The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power of levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises and manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their system of local self-government. If, in the changes of wealth and population in particular States, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the States, however small, in the Senate, was stipulated for. The Constitution ordains affirmatively that each State shall have two members of that body, and negatively that no State shall by amendment be deprived of its equal suffrage in the Senate without its consent. The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by in-

direct taxes. And in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminately, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, in *McCulloch v. Maryland*, "the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." 4 Wheat. 428. And they retained this security by providing that direct taxation and representation in the lower house of Congress should be adjusted on the same measure.

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language.

It is said that a tax on the whole income of property is not a direct tax in the meaning of the Constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blown to the winds in another. * * * *

The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, it is not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom.

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds.

There can be but one answer unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or

ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, is open to direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed." * * * *

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer or account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable, have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from whence it is derived. * * * *

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation, on business, privilege, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven and thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in *Warren v. Charlestown*, 2 Gray, 84, is applicable, that if the different parts "are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

According to the census, the true valuation of real and personal property in the United States in 1890 was \$65,037,091,197, of which real estate with improvements thereon made up \$39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed four thousand dollars; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stock, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We cannot believe that such was the intention of Congress. We do not mean to say that an act laying by apportionment a direct tax on real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act; and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act, which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void.

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.

Note.—On February 25, 1913, the XVI Amendment, authorizing Congress to lay and collect taxes on incomes without apportionment was proclaimed in force, and under the authority of this Amendment, on October 3, 1913, Congress enacted the Federal Income Tax Law, which will be found analyzed in the Appendix.

KNOWLTON *v.* MOORE.

178 U. S., 41. 1900.

The Act of Congress of June 13th, 1898, known as the War Revenue Act, imposed a tax on all personal property passing by will or under the intestate laws of a State, to lineal or collateral heirs. The rate of the tax was graduated according to the amount of the legacy or interest and the relationship to the decedent of the party receiving the same. It was further provided that the tax should be imposed only upon legacies or interests exceeding the sum of ten thousand dollars. One Edwin Knowlton died in Brooklyn, N. Y., in October, 1898, and his will was probated and the executors duly qualified. Moore, the Collector of Internal Revenue, demanded of the executors a full statement showing the amount of the personal estate of the deceased, and the legatees and distributees. The collector levied a tax on the legacies and distributive shares, but in fixing the rate considered the whole of the personal estate of the deceased, and not the amount coming to each individual legatee under the will. As the personal estate which the deceased (Knowlton) left amounted to over two and a half millions of dollars and the rates under the statute were progressive from a low rate on legacies amounting to \$10,000, to a high rate on those exceeding \$1,000,000, this decision greatly increased the aggregate amount of the taxation. The tax was assessed at \$42,084.67. The executors paid the tax under protest and sued in the Circuit Court to recover the amount paid on the grounds (1) That the act was unconstitutional; (2) That the rate of the tax was improperly fixed by the assessor. The Circuit Court dismissed the suit, whereupon the executors appealed the case to the United States Supreme Court.

MR. JUSTICE WHITE delivered the opinion of the court.

(The first portion of the opinion is devoted to a historical discussion of inheritance and legacy taxes, or "death duties," as they are also known, in England, France and Germany, and the early forms of such taxes in this country. It explains that it is to the passage of property by will or by descent in cases of intestacy, that taxes of this character relate, as distinguished from taxes on property because of its ownership and possession. Such taxes are collected in France and Germany as stamp duties and are regarded as indirect taxes. In England death duties or succession taxes were known since 1694, and were collected on real estate and interests in personal property passing at time of death. In the United States, Congress imposed a legacy tax as early as 1797, and again in 1862 a similar act was passed. In 1864 Congress enacted a law which largely increased both the probate duty or tax on the whole estate and the legacy tax on each particular legacy or distributive share. The same act also added a tax on real estate passing to all except certain descendants. Finally the Act of Congress of August 27, 1894, was in part a legacy tax, though denominated an income tax law. This Act was never enforced, however, its provisions

being held unconstitutional in the case of *Pollock v. Farmers' Loan and Trust Company*, 157 U. S. 429. After the foregoing review of such taxes, the opinion continues:)

Thus looking over the whole field, and considering death duties in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several States of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. * * *

Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore, the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of State legislation. It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government. The Act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention which framed the Constitution must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within State authority. It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and, although their constitutionality was assailed on other grounds held unsound by this court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question. * * *

(The opinion then deals with the subject matter of the tax and the property in particular affected by the Act, as follows:)

On the very threshold, the theory that the tax is not on particular legacies or distributive shares passing upon a death, but is on the whole amount of the personal property of the deceased, is rebutted by the heading which describes what is taxed, not as the estates of deceased persons, but as "legacies and distributive shares of personal property." This, whilst not conclusive, is proper to be considered in interpreting the statute, when ambiguity exists and a literal interpretation will work out wrong or injury.

The opening words of section 29 may, for clearness, be thus arranged:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property . . . passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory . . . shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows:—that is to say", etc.

Thus collocated, the statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate. It does not say that the tax is levied on the personal estate left by the deceased person, but it is imposed on legacies or distributive shares arising from such property. This is made clearer by considering that in the very same section the tax is described as being upon any interest which may have been "transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, bargainor, to any person or persons", etc. That is to say, whilst the law places the duty on any legacy or distributive share passing by death, it puts a like burden on gifts which may have been made in contemplation of death and otherwise than by last will and testament.

Following the paragraph from which the foregoing has been quoted the statute makes five distinct classes or enumerations whereby the rate of the tax is varied, that is, it is made more or less, depending upon the relationship, or want of relationship of the legatee or distributee to the deceased. But this enumeration can only be explained upon the hypothesis that the law intended to impose a greater or less tax upon a legatee or distributee, arising from his degree of relationship or his being a stranger in blood to the deceased. Thus it cannot be doubted that, in assessing the tax the position of each separate legatee or distributee must be taken into view in order to ascertain the primary rate which the statute establishes. (The court after discussion reaches the result that the amount of each particular legacy or share and not the entire personal estate of a decedent is the amount on which the tax is imposed, and so determines the particular rate of the tax which is progressive from a low rate on legacies amounting to \$10,000 to a high rate on legacies exceeding \$1,000,000. Thus the mode

in which the tax was computed by the assessor upon the entire bulk of the estate of over two millions of dollars was held to be erroneous by this Court.) * * *

The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed. This legislative and administrative view of such taxes has been directly upheld by this court. In *Scholey v. Rew*, 23 Wall, 349, to which we have heretofore referred, the question presented was the constitutionality of the provisions of the act of 1864, imposing a succession duty as to real estate. The assertion was that the duty was repugnant to the Constitution, because it was a direct tax and had not been apportioned. The tax was decided to be constitutional. The court said (p. 346):

"But it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of these provisions. Instead of that it is plainly an excise tax or duty, authorized by section 8 of article 1, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare." * * *

Concluding then that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

The contention is that because the statute exempts legacies and distributive shares in personal property below \$10,000, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of section 8 of article 1 of the Constitution, which provides that "duties, imposts, and excises shall be uniform throughout the United States."

The argument to the contrary, whilst conceding that the tax devised by the statute does not fulfil the requirement of equality and uniformity, as those words are construed when found in state constitutions, asserts that it does not thereby follow that the taxes in question are repugnant to the Constitution of the United States, since the provision in the Constitution, that "duties, imposts and excises shall be uniform throughout the United States," it is in-

sisted, has a different meaning from the expression "equal and uniform," found in state constitutions. In order to decide these respective contentions it becomes at the outset necessary to accurately define the theories upon which they rest.

On the one side, the proposition is that the command that duties, imposts, and excises shall be uniform throughout the United States relates to the inherent and intrinsic character of the tax; that it contemplates the operation of the tax upon the property of the individual taxpayer, and exacts that when an impost, duty, or excise is levied, it shall operate precisely in the same manner upon all individuals; that is to say, the proposition is that "uniform throughout the United States" commands that excises, duties, and imposts, when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words equal and uniform, as now found in the constitutions of most of the states of the Union. The contrary construction is this: That the words "uniform throughout the United States" do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, *the same plan and the same method must be made operative throughout the United States*; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its operations upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform. * * * *

Considering the text, it is apparent that if the word "uniform" means "equal and uniform" in the sense now asserted by the opponents of the tax, the words "throughout the United States," are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution. * * * *

The proceedings of the Continental Congress also make it clear that the words "uniform throughout the United States" which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression "*to operate generally throughout the United States.*" The foregoing situation so thoroughly permeated all the proceedings of the Continental Congress that we might well rest content with their mere statement. We shall, however, make a few references on the subject.

Thus it is apparent that the expression "uniform throughout the United States" was at that time considered as purely geographical, as being synonymous with the expression "general operation through-

out the United States" and that no thought of restricting Congress to intrinsic uniformity obtained, since the powers recommended were absolutely in conflict with such theory. * * * *

In the convention which framed the Constitution the same argument was used without success, and, as we have seen, the only ground upon which the striking out of the words "and equal" after the word "uniform," in the Constitution, can be reasonably explained, is that it was done to prevent the implication that the duties, imposts, and excises which were to be uniform throughout the United States were to be placed upon rights equally existing in the several states. To now adopt the proposition relied on would be virtually, then, to nullify the action of the convention, and would relegate the taxing power of Congress to the impotent condition in which it was during the confederation.

Lastly, it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the Constitution. Without intimating any opinion as to the existence of a right in the courts to exercise the power which is thus invoked, it is apparent that the argument as to the enormity of the tax is without merit. It was disposed of in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 293.

The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative, and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious.

It follows from the foregoing opinion that the court below erred in denying all relief, and that it should have held the plaintiff entitled to recover so much of the tax as resulted from taxing legacies not exceeding \$10,000, and from increasing the tax rate with reference to the whole amount of the personal estate of the deceased from which the legacies or distributive shares were derived. For these reasons the judgment below must be reversed, and the

case be remanded, with instructions that further proceedings be had according to law and in conformity with this opinion, and it is so ordered.

Mr. Justice Brewer dissents from so much of the opinion as holds that a progressive rate of tax can be validly imposed. In other respects he concurs.

Mr. Justice Peckham took no part in the decision.

Mr. Justice Harlan dissenting:

While I concur in the construction placed by the court upon the clause of the Constitution declaring that all duties, imposts and excises shall be "uniform throughout the United States," I dissent from that part of the opinion construing the 29th and 30th sections of the revenue act. In my judgment, the question whether the tax presented by Congress shall or shall not be imposed is to be determined with reference to the whole amount of the personal property out of which legacies and distributive shares arise. If the value of the whole personal property held in charge or trust by an administrator, executor, or trustee exceeds \$10,000 then every part of it constituting a legacy or distributive share, except the share of a husband or wife, is taxed at the progressive rate stated in the act of Congress. I do not think the act can be otherwise interpreted without defeating the intent of Congress.

Construed as I have indicated, the act is not liable to any constitutional objection.

Mr. Justice McKenna concurs in this dissent.

Note.—See also *Veasie Bank v. Fenno*, page 48.

CORPORATION TAX CASES.

FLINT *v.* STONE TRACY COMPANY.

United States Supreme Court, March, 1911.
220 U. S., 611.

Congress by the Act of August 5, 1909, passed what is generally known as "The Corporation Tax Law." Under the provisions of this law an annual tax of one per centum was imposed upon the entire net income over and above five thousand dollars of every corporation engaged in business in the United States and its territories. Fifteen appeals were taken to the Supreme Court from judgments for the taxes assessed under the Act in order to test its constitutionality. The tax was designated in the act as a "special excise tax," but it was contended by those appealing from the tax that the tax in question was a direct tax and should have been apportioned according to population as required by the Constitution. The cases were first argued in March, 1910, but subsequently

were reargued in January, 1911, and decided on March 13, 1911. The important section of the act is as follows:

"SEC. 38. That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska, or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed."

MR. JUSTICE DAY delivered the opinion of the court.

While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless, the declaration of the law-making power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above \$5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organization of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies the tax is imposed upon the transaction of such business by companies

organized under the laws of the United States or any State or Territory, as heretofore stated. * * *

Having thus interpreted the statute in conformity, as we believe, with the intention of Congress in passing it, we proceed to consider whether as, thus construed, the statute is constitutional.

The Pollock case was before this court in *Knowlton v. Moore*, 178 U. S., 41. In that case this court sustained an excise tax upon the transmission of property by inheritance. It was contended there, as here, that the case was ruled by the Pollock case, and of that case this court, speaking by the present Chief Justice, said:

"Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons *solely because of their general ownership of property* from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises, which are not the essential equivalents of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall." * * *

The act now under consideration does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Article 1, Section 8, Clause 1 of the Constitution, and described generally as taxes, duties, imposts and excises, upon which the limitation is that they shall be uniform throughout the United States.

Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The Pollock case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way. * * *

The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing

business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi-corporate organization, or, when applied to insurance companies, for doing the business of such companies. * * * *

If we are correct in holding that this is an excise tax, there is nothing in the Constitution requiring such taxes to be apportioned according to population. * * * *

It is urged that this power can be so exercised by Congress as to practically destroy the right of the States to create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in *McCulloch v. Maryland* that the power to tax involves the power to destroy.

The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice. * * * *

We have noticed such objections as are made to the constitutionality of this law as it is deemed necessary to consider. Finding the statute to be within the constitutional power of Congress, it follows that the judgments in the several cases must be affirmed.

Affirmed.

Section 2.

POWER OF CONGRESS OVER COMMERCE.

Sub-Section A.

EXTENT OF THE FEDERAL POWER.

1. In General.

GIBBONS *v.* OGDEN.

9 WHEATON, 100. 1824.

One Aaron Ogden filed a bill praying for an injunction in the Court of Chancery of New York against Thomas Gibbons. The bill set out the several acts of the legislature of that State which secured to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of the State, with boats moved by steam or fire, for a certain term of years, which had not expired at the time the suit was brought. The statutes also authorized the court to award an injunction, restrain-

ing any person whatever from navigating those waters with boats of that description. Livingston and Fulton had assigned to one John R. Livingston, who in turn had assigned to the complainant, Ogden, the right to navigate the waters between Elizabethtown and other places in New Jersey and the City of New York. Gibbons, the defendant, in violation of the exclusive privilege held by Ogden, was running two steamboats between New York and Elizabethtown. The injunction prayed for was granted, but Gibbons in his answer stated that his boats were duly enrolled and licensed to be employed in carrying on the coasting trade, under an Act of Congress of February 18th, 1793, and he insisted on his right by virtue of such license to navigate the waters between the two ports. An appeal from the order granting the injunction was taken to the highest court of New York State, which upheld the injunction, from which decree the cause was carried to the United States Supreme Court.

CHIEF JUSTICE MARSHALL delivered the opinion of the court.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the Constitution and laws of the United States.

They are said to be repugnant—

1. To that clause in the Constitution which authorizes Congress to regulate commerce.
2. To that which authorizes Congress to promote the progress of science and useful arts.

The State of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. * * *

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. * * * *

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes, must also be considered as showing that all America is united in that construction which comprehends navigation in the word commerce. * * * *

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation, within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be convenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are

remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction¹ of the several States. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry—what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies. * * * *

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest

tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. * * * *

It has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. * * * *

As this decides the cause, it is unnecessary to enter in an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts. * * * *

Powerful and ingenious minds, taken as postulates that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the Constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be deceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the test of the arguments to be examined.

Decree of Courts of New York was reversed and the bill of Ogden dismissed.

PENSACOLA TELEGRAPH COMPANY *v.* WESTERN
UNION TELEGRAPH COMPANY.

96 U. S., 1. 1877.

The Act of Congress of July 24, 1866, provided that telegraph companies might construct and operate telegraph lines over any

portion of the public domain of the United States and over and under navigable streams of the United States. On December 11, 1866, the Pensacola Telegraph Company was chartered by the Florida Legislature and was given an exclusive privilege to establish and maintain telegraph lines in certain counties of the State, connecting with lines from within or without the State. In 1874 the Legislature of Florida empowered the Pensacola and Louisville Railroad Company to construct a line of telegraph along its road and to sell its franchise to other telegraph companies. This grant embraced the territory of the exclusive grant given to the Pensacola Company by the State Act of December 11, 1866. The Western Union Telegraph Company, claiming under the railroad company, began to string their wires in this exclusive territory, and the Pensacola Company filed a bill in equity in the Circuit Court for the Northern District of Florida, to enjoin the erection of the defendant's line. The question raised was whether the act of the State, conferring the exclusive privilege on the plaintiff was constitutional. It was argued that it was repugnant to the Federal statute of July 24, 1866.

The United States Circuit Court dismissed the plaintiff's bill, whereupon it appealed the case to the United States Supreme Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Congress has power "to regulate commerce with foreign nations and among the several States" (Const. Art. 1, Sec. 8, par. 3); and "to establish post-offices and post-roads" (*id.*, par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Art. 6, par. 2. A law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict.

Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating powers of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were in-

trusted to the general government for the good of the nation, it is not only the right, but the duty of Congress to see to it that the intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulate prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. No telegraph line can cross the State from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport, at which business centres, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted.

The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelli-

gence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. * * *

The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is, therefore, inoperative as against a corporation of another State entitled to the privileges of the Act of Congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of Pensacola and Louisville Railroad Company under the arrangement made for that purpose.

Decree affirmed.

UNITED STATES *v.* OHIO OIL COMPANY, ET AL.

234 U. S. 548. Decided June 22nd, 1914.

"THE PIPE LINE CASES."

By the Act of Congress of June 29th, 1906, the Interstate Commerce Act of 1887 was amended so that the first section reads in part as follows: "That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act." Thereafter the Interstate Commerce Commission issued an order requiring the Ohio Oil Company, the Standard Oil Company and several other oil companies, being parties in control of pipe lines, to file with the Commission schedules of their rates and charges for the transportation of oil. The oil companies thereupon brought suit in the commerce court to set aside and annul the order, and a preliminary injunction was issued by that court, on the broad ground that the statute applies to every pipe line that crosses a State boundary, and that thus construed it is unconstitutional. The United States and the Interstate Commerce Commission appealed.

The circumstances under which the amendment was passed are as follows: The Standard Oil Company, a New Jersey corporation, owned the stock of the New York Transit Company, a pipe line made a common carrier by the laws of New York, and of the National Transit Company, a Pennsylvania corporation of like character, and

by these it connected the Appalachian oil field with its refineries in the East. It owned nearly all the stock of the Ohio Oil Company, which connected the Lima-Indiana field with its system; and the National Transit Company, controlled by it, owned nearly all the stock of the Prairie Oil and Gas Company, which ran from the mid-continent field in Oklahoma and Kansas and the Caddo field in Louisiana to Indiana, and connected with the previously mentioned lines. It also was largely interested in the Tide Water Pipe Company, Limited, which connected with the Appalachian and other fields and pursued the methods of the Standard Oil Company about to be described. By the before-mentioned and subordinate lines the Standard Oil Company had made itself master of the only practicable oil transportation between the oil fields east of California and the Atlantic Ocean, and carried much the greater part of the oil between those points.

Availing itself of its monopoly of the means of transportation, the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners, but by the duress of which the Standard Oil Company was master, carrying it all as its own. The main question is whether the act does and constitutionally can apply to the several constituents that then had been united into a single line.

The government also brought separate suits against the Standard Oil Company, the Standard Oil Company of Louisiana, the Prairie Oil and Gas Company, and the Uncle Sam Oil Company. The principal questions involved being the same in all the cases, the one opinion of the court decided the suits instituted.

MR. JUSTICE HOLMES delivered the opinion of the court:

Taking up first the construction of the statute, we think it plain that it was intended to reach the combination of pipe lines that we have described. The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words "who shall be considered and held to be common carriers within the meaning and purpose of this act" obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such. If the Standard Oil Company and its co-operating companies were not so engaged, no one was. It not only would be a sacrifice of fact to form, but would empty the act if the carriage to the seaboard of nearly all the oil east of California were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. As applied to them, while the amendment does not compel them to continue in operation,

it does require them not to continue except as common carriers. That is the plain meaning, as has been held with regard to other statutes similarly framed. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186. Its evident purpose was to bring within its scope pipe lines that, although not technically common carriers, yet were carrying all oil offered, if only the offerers would sell at their price.

The only matter requiring much consideration is the constitutionality of the act. That the transportation is commerce among the States we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. *Rearick v. Pennsylvania*, 203 U. S. 507. See *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111. The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the act.

The control of Congress over commerce among the States cannot be made a means of exercising powers not intrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form. So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established, there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we already have intimated, those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees, if they carry, must do it in a way that they do not like. There is no taking, and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view. *Hoke v. United States*, 227 U. S. 308; *Lottery Case (Champion v. Ames)*, 188 U. S. 321.

These considerations seem to us sufficient to dispose of the cases of the Standard Oil Company, the Ohio Oil Company, the Prairie Oil and Gas Company, and the Tide Water Pipe Company, Limited. The Standard Oil Company of Louisiana was incorporated since the passage of the amendment, and before the beginning of this suit, to break up the monopoly of the New Jersey Standard Oil Company. It buys a large part of its oil from the Prairie Oil and Gas Company, which buys it at the wells in the mid-continent field and transfers the title to the Louisiana Company in that State. Its case also is covered by what we have said.

There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma,

with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a State line to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end. In that case the decree will be affirmed. In the others the decree will be reversed.

Decree reversed.

PENNSYLVANIA *v.* THE WHEELING AND BELMONT
BRIDGE COMPANY.

18 HOWARD, 421. 1855.

The State of Virginia empowered the Wheeling and Belmont Bridge Company to build a bridge across the Ohio River at Wheeling. The bridge interfered with the passage of boats on the river. The State of Pennsylvania filed a bill to have the bridge removed as a public nuisance. In May, 1852, the Supreme Court of the United States decreed that it should be removed. Pending the decree the bridge was destroyed by a storm. The bridge was being rebuilt as it was originally despite the court's decree. On August 31, 1852, subsequent to the decree, Congress passed an act authorizing the Bridge Company to have and maintain the bridge at the height to which it had been rebuilt, and declared it to be a post-road of the United States. Pennsylvania moved for a writ of assistance to execute the original decree. The argument for Pennsylvania was that this Act of Congress was unconstitutional as interfering with navigation. This case was one of original jurisdiction in the Supreme Court.

MR. JUSTICE NELSON delivered the opinion of the court.

The defendants rely upon this Act of Congress as furnishing authority for the continuance of the bridge as constructed, and as superseding the effect and operation of the decree of the court previously rendered, declaring it an obstruction to the navigation.

On the part of the plaintiff, it is insisted that the act is unconstitutional and void, which raises the principal question in the case.

In order to a proper understanding of this question it is material to recur to the ground and principles upon which the majority of the court proceeded in rendering the decree now sought to be enforced.

The bridge had been constructed under an act of the legislature of the State of Virginia; and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce. It was claimed, however, that Congress had acted upon the subject and had regu-

lated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of Congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law.

This being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion, that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the Constitution and laws of Congress, nor in applying the appropriate remedy in behalf of the plaintiff. The ground and principles upon which the court proceeded will be found reported in 13 How. 518.

Since, however, the rendition of this decree, the acts of Congress already referred to, have been passed, by which the bridge is made a post-road for the passage of the mails of the United States, and the defendants are authorized to have and maintain it at its present site and elevation, and requiring all persons navigating the river to regulate such navigation so as not to interfere with it.

So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, it is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the Legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of its power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and Federal, which, if not sufficient, certainly none can be found in our system of government * * * *

Upon the whole, without pursuing the examination further, our conclusion is, that, so far as respects that portion of the decree which directs the alteration or abatement of the bridge, it cannot be carried into execution since the Act of Congress which regulates the navigation of the Ohio River, consistent with the existence and continuance of the bridge; and that this part of the motion in behalf of the plaintiff must be denied. But that, so far as respects that portion of the decree which directs the costs to be paid by the defendants, the motion must be granted.

Note.—On April 6th, 1914, in the case of *Kansas City Southern Railway Company v. Kaw Valley Drainage District of Wyandotte, Kansas*, 233 U. S. 75, the Supreme Court ruled that a State could not order the removal of an

interstate railway bridge. The railway company was the owner of bridges across the Kansas River. It was alleged by the State that the bridges were so low they caused the river to overflow its banks and flood a large section of Kansas City, Kansas. The State ordered the elevation of the bridges or their removal altogether. The company contended that its railway tracks across the bridge were used in commerce among the States, and that such commerce would be cut off and destroyed by the enforcement of the order. Wherefore, the company claimed the protection of the commerce clause of the Constitution. The Supreme Court of Kansas sustained the order of the State. The Supreme Court of the United States decided that the removal of the bridges, which formed necessary parts of lines of interstate commerce, could not be ordered by a State court, even in the avowed expectation that such order would lead to the desired elevation of the bridges, which the State could not order directly without the authority of the Secretary of War

2. The Meaning of Commerce

McCREADY *v.* VIRGINIA.

94 U. S., 391. 1876.

One James W. McCready, a citizen of Maryland, was convicted and fined \$500 in the Circuit Court of Gloucester County, Va., for planting oysters in Ware River, a stream in which the tide ebbs and flows. The conviction was under the provisions of a statute of Virginia, of April 18, 1874, which was as follows:

"If any person other than a citizen of this State shall take or catch oysters, or any shell fish in any manner, or plant oysters in the waters thereof, or in the Rivers Potomac or Pocomoke, he shall forfeit \$500, and the vessel, tackle and appurtenances."

It was contended that the statute was in violation of the clause of the Constitution giving Congress the power to regulate commerce. The Supreme Court of the State sustained the lower court, whereupon an appeal was taken to the Supreme Court of the United States.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

* * * Neither do we think this case is affected by the clause of the Constitution which confers power on Congress to regulate commerce, Art. 1., Sec. 8. There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade. Virginia, owning land under water adapted to the propagation and improvement of oysters, has seen fit to grant the exclusive use of it for that purpose to the citizens of the State. In this way, the people of Virginia may be enabled to produce what the people of other States cannot; but that is because they own property which the others do not. Their productions do not spring from commerce, but commerce to some extent from them. *Judgment affirmed.*

Note.—Compare this case with the earlier decision of the Supreme Court in *Corfield vs. Coryell*, in *fra*, page 310.

UNITED STATES *v.* E. C. KNIGHT COMPANY.

156 U. S., 1. 1895.

The American Sugar Refining Co., a New Jersey corporation, being in control of a large majority of the manufactories of refined sugar in the United States, acquired through the purchase of stock in four Philadelphia refineries,* such control over those manufactories that it obtained thereby a practical monopoly of the refining of sugar throughout the United States.

The United States government filed a bill in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania against the American Sugar Refining Company and four other corporations, among which was the E. C. Knight Company, charging that these corporations had violated the Act of Congress of July 2, 1890 (Sherman Anti-Trust Act), entitled "An act to protect trade and commerce against unlawful restraints and monopolies, which provided, that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several States is illegal, and that persons who shall monopolize or shall attempt to monopolize or combine or conspire with other persons to monopolize trade and commerce among the several States shall be guilty of a misdemeanor." The government asked that the agreements for the purchase of the capital stock of the four refineries be cancelled and declared void, and that the defendants be enjoined from carrying them out and violating said act. The Circuit Court dismissed the bill, whereupon an appeal was taken to the Supreme Court.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890.

The relief sought was the cancellation of the agreements under which the stock was transferred; the redelivery of the stock to the parties respectively; and an injunction against the further performance of the agreements and further violations of the act. As usual, there was a prayer for general relief, but only such relief could be afforded under that prayer as would be agreeable to the case made

Note.—The four Philadelphia Refineries were the E. C. Knight Company, the Franklin Sugar Company, the Spreckels Sugar Refining Company and the Delaware Sugar House.

by the bill and consistent with that specifically prayed. And as to the injunction asked, that relief was ancillary to and in aid of the primary equity, or ground of suit, and, if that failed, would fall with it. The ground here was the existence of contracts to monopolize interstate or international trade or commerce, and to restrain such trade or commerce, which, by the provisions of the act, could be rescinded, or operations thereunder arrested. * * * *

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill. * * * *

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to the necessities of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce. * * * *

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal policy. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. This was so ruled in *Coe v. Errol*, 116 U. S., 517, 525. * * * *

In *Kidd v. Pearson*, 128 U. S., 20, 21, 24, where the question was discussed whether the right of a State to enact a statute

prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. And Mr. Justice Lamar remarked:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management. * * * * The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contem-

plated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the State government, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." And see *Veazie v. Moor*, 14 How. 568, 574. * * * *

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for State control.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true

that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.

The Circuit Court declined, upon the pleadings and proofs, to grant the relief prayed, and dismissed the bill, and we are of opinion that the Circuit Court of Appeals did not err in affirming that decree.

Decree affirmed.

PAUL v. VIRGINIA.

8 WALLACE, 168. 1868.

A statute of Virginia enacted that insurance companies of other States, must before issuing policies in Virginia, take out a license and deposit with the State Treasurer bonds to a large amount. One Samuel B. Paul, the agent of several New York companies, was convicted of issuing policies of insurance in the State without having complied with this statute. He appealed from the decision of the highest State court sustaining his conviction to the Supreme Court of the United States.

Paul claimed among other things that the Virginia statute, so far as his transactions were concerned, was unconstitutional as a regulation of interstate commerce.

MR. JUSTICE FIELD delivered the opinion of the court.

"It is undoubtedly true. . . that the power conferred upon Congress to regulate commerce, includes as well commerce carried on by corporations as commerce carried on by individuals."

There is, therefore, nothing in the fact that the insurance companies of New York are corporations, to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like personal contracts between parties which are completed by their signature and the transfer of consideration: Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce. * * * *

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be

Affirmed.

CHAMPION v. AMES.

188 U. S., 321. 1902.

The Act of Congress of March 2, 1895, prohibited the carriage of lottery tickets in the United States mails or in interstate commerce, and made it a punishable offense to introduce such tickets in the mails or in interstate commerce. Charles F. Champion violated the act by shipping a box containing two lottery tickets via the Wells-Fargo Express Company, from Dallas, Texas, to Fresno, California, for which offense he was indicted under the act and taken into custody by United States Marshal John C. Ames. Thereupon he sued out a writ of *habeas corpus* in the Circuit Court for the Northern District of Illinois, upon the ground that the act of 1895, under which it was proposed to try him was void, under the Constitution of the United States, as the carrying of lottery tickets

did not constitute "commerce" among the States. The Circuit Court denied him the writ of *habeas corpus*, whereupon he appealed the case to the Supreme Court of the United States.

MR. JUSTICE HARLAN delivered the opinion of the majority of the court.

"It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign country represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if the holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. * * * * We are of the opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States. * * * * That under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution on the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

The judgment of the Circuit Court quashing the writ of *habeas corpus* must be. Affirmed.

3. When Commerce is Interstate or Foreign.

COE *v.* ERROL.
116 U. S., 517. 1885.

Edward S. Coe was the owner of certain logs which had been cut in New Hampshire and were deposited on the banks of the

Androscoggin River in the town of Errol, New Hampshire, to be floated down stream into Maine when a convenient opportunity should arrive. The Androscoggin River starts in Maine, but, after running a distance through that State, crosses the line and runs a distance through the State of New Hampshire, and then back into the State of Maine. Coe owned certain other logs which had been cut in Maine and were being floated down this stream in New Hampshire to Lewiston, Maine, but were detained on account of low water at Errol. The town officials of Errol assessed a certain tax on all these logs while they thus remained in the town. Coe filed a petition in the State court to have the tax abated. The State court abated the tax as far as it affected the logs which had floated down the stream from Maine and were on their way to Lewiston. Coe appealed the case to the United States Supreme Court on the ground that the tax was an interference with interstate commerce.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Are the products of a State though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.

This question does not present the predicament of goods in course of transportation through a State, though detained for a time by low water or other causes of delay, as was the case with the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only

within the State of their origin, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without discrimination, in the usual way and manner in which such property is taxed in the State. * * * *.

The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the State of Maine. They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination. They come precisely within the character of property which, according to the principles herein laid down, is taxable.

The judgment of the Supreme Court of New Hampshire is

Affirmed.

THE DANIEL BALL.

10 WALLACE, 557. 1870.

An Act of Congress of July 7, 1838, provided that the owner, master or captain of any vessel propelled by steam transporting merchandise or passengers upon "the bays, lakes, rivers or other navigable waters of the United States" must obtain a license. A penalty was imposed for a failure to observe the statute. A later statute of August 30, 1852, provided for the inspection of such vessels. In March, 1868, the Daniel Ball, a vessel propelled by steam, was engaged in navigating the Grand River in the State of Michigan between the cities of Grand Rapids and Grand Haven, both of which were in the State of Michigan, and in the transportation of merchandise and passengers between those places, without having been licensed or inspected under the laws of the United States. An action was brought by the United States in the District Court for the Western District of Michigan to recover the penalty provided for failure to obtain such inspection and license. The government contended that the Grand River was a navigable water of the United States, and in addition that the steamer transported merchandise destined for ports and places outside the State of Michigan, and was thus engaged in commerce between the States. The owners of the vessel defended on the ground that the Grand River was not a navigable river, that the steamer was engaged solely in domestic commerce, and that she was not subject to the navigation laws of the United States.

The District Court dismissed the action. The Circuit Court reversed this decision, and gave a decree for the penalty demanded. From this decree the case was brought by appeal to the Supreme Court of the United States.

MR. JUSTICE FIELD delivered the opinion of the court:

Two questions are presented in this case for our determination.

First. Whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the acts of Congress; and,

Second. Whether those acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State.

Upon the first of these questions we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought

under the direct control of Congress in the exercise of its commercial power. * * * *

But it is contended that the steamer Daniel Ball was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented.

There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States," or foreign nations and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State; and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation.

Decree of the Circuit Court is

Affirmed.

GLOUCESTER FERRY COMPANY *v.* PENNSYLVANIA.
114 U. S., 196. 1885.

The Gloucester Ferry Company was incorporated in 1865 under the laws of the State of New Jersey to establish a steamboat ferry from the town of Gloucester, New Jersey, to the City of Philadelphia, Pennsylvania. It established and has maintained such a ferry, and has at the places named a slip or dock on which passengers and freight are received and landed. The dock in Philadelphia is leased. The one in Gloucester is owned by the company. A statute of Pennsylvania, passed June 7, 1879, provided in substance that any company or association incorporated in Pennsylvania or elsewhere and doing business within the State should pay annually a tax computed upon its capital stock according to the dividends declared. The Court of Common Pleas of Philadelphia held that the tax could not be lawfully levied upon the company, as the landing of passengers and freight was the only business carried on by the company in the State and was protected by the Constitution from State legislation as interstate commerce. The Supreme Court of Pennsylvania on appeal decided in favor of the tax, and to review this judgment an appeal was taken to the Supreme Court of the United States.

MR. JUSTICE FIELD delivered the opinion of the court.

* * * * As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed, is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation. * * * * Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions.

Judgment of the Supreme Court of Pennsylvania is reversed.

Note.—In *City of Sault Ste. Marie v. International Transit Company*, 234 U. S. 333 (June 8th, 1914), the Supreme Court declared unconstitutional an ordinance of the City of Sault Ste. Marie, Michigan, requiring a license fee for the operation of ferries to the Canadian shore. The defendant company, a Canadian corporation, was the owner of and operated a steam ferry from

Sault Ste. Marie, Ontario, to Sault Ste. Marie, Michigan. It leased a private wharf in the Michigan city and maintained an office where fares were received. Under State authority, a license fee of fifty dollars was imposed by the ordinance for the privilege of carrying on such a ferry. The court held that the case came within the principle of *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196, that one cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce.

4. Meaning of the Sherman Anti-Trust Law.

UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASSOCIATION.

166 U. S. 290, 1897.

The United States Government brought suit in equity in the United States Circuit Court for the District of Kansas against the Trans-Missouri Freight Association, and the several railway companies composing the said association, for the purpose of having declared illegal and void a certain agreement entered into between the said railway companies for mutual protection, and to establish and maintain rates, rules and regulations on all freight traffic included within a defined territory. The United States asked that the said association of the railways be dissolved and a perpetual injunction be granted against any similar combination and association in the future of such constituent railways. The basis of the government's contention was that the agreement in question was contrary to the Sherman Anti-Trust Law,* as being in restraint of trade among the States. The lower court dismissed the government's suit. The case was carried on appeal to the Supreme Court.

Sections of the agreement are in part as follows:

That "a committee shall be appointed to establish rates, rules and regulations on the traffic subject of this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article 7."

That "at least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah. * * *

At each monthly meeting, the association shall consider and vote upon all changes proposed, of which due notice has been given, and all parties shall be bound by the decisions of the association, as

Note.—For the provisions of the Sherman Anti-Trust Act see Appendix.

expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter, they shall make such modification notwithstanding the vote of the association: Provided, That if the member giving notice of change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favors the same, and if, in the judgment of such majority the rate so made effects seriously the rates upon other traffic, then the association may, by a majority vote, upon such other traffic put into effect corresponding rates to take effect on the same day. By unanimous consent, any rate, rule or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine not to exceed \$100, to be paid to the association. If any line party hereto agrees with a shipper, or anyone else, to secure a reduction or change in rates, or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected and traffic thereby secured, such action shall be reported to the managers, who shall determine as above provided, what, if any, penalty shall be necessary.

MR. JUSTICE PECKHAM delivered the opinion of the court.

Coming to the merits of the suit there are two important questions which demand our examination. They are, first, whether the above cited Act of Congress (called herein the Trust Act) applies to and covers common carriers by railroad; and if so, second, Does the agreement set forth in the bill violate any provision of that Act?

As to the first question.

The language of the act includes every contract, combination in the form of trust or otherwise, or conspiracy in the restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby effecting traffic rates for the transportation of persons and property. If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation, cannot restrain trade or commerce. We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by this act. It cannot be denied that

those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce and might more or less restrain it. The point urged on the defendants' part is that the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations and conspiracies were engaged in effecting the supply or the price or the place of manufacture of such articles. The terms of the act do not bear out such construction. Railroad companies are instruments of commerce, and their business is commerce itself. *Philadelphia & R. R. Co. v. Pennsylvania* ("State Freight Tax"), 82 U. S. 15 Wall, 23; *Western Union Telegraph Co. v. Texas*, 105 U. S. 460.

An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the States, provided such contract by its direct effect produces a restraint of trade or commerce. What amounts to a restraint within the meaning of the act if thus construed need not now be discussed. * * * *

It is said that Congress had very different matters in view and very different objects to accomplish in the passage of the act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the State governments to successfully cope with them because of their commercial character and of their business extension through the different States of the Union. Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whiskey Trust, and many others, and these trusts it was stated had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this kind it is contended that the act in question was directed and not to the combinations of competing railroads to keep up their prices to a reasonable sum for the transportation of persons and property. It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably sought to cover them by the provisions of the act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave them. But a further investigation of "the history of the times" shows also that those trusts were not the only associa-

tions controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations among the different roads. Whether these complaints were well or ill founded we do not presume at this time and under these circumstances to determine or to discuss. It is simply for the purpose of answering the statement that it was only to trusts of the nature as above set forth that this legislation was directed, that the subject of the opinions of the people in regard to the actions of the railroad companies in this particular is referred. A reference to this history of the times does not, as we think, furnish us with any strong reason for believing that it was only trusts that were in the minds of the members of Congress, and that railroads and their manner of doing business were wholly excluded therefrom. * * * *

The next question to be discussed is to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute that "every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal?" Is it confined to a contract or combination which is only in *unreasonable restraint of trade* or commerce, or does it include what the language of the act plainly and in terms covers all contracts of that nature. * * * * It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable restraint of trade*, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term "contract in restraint of trade" includes only such contracts as are in *unreasonable restraint of trade* and when that term is used in the Federal statute it is not intended to include all contracts in *restraint of trade* thereof.

The term is not of such limited signification. Contracts in *restraint of trade* have been known and spoken of for hundreds of years both in England and this country and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in *restraint of trade* and still

be valid at common law. Although valid, it is nevertheless a contract in restraint of trade and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature whether valid or otherwise would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. *When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language and no exception or limitation can be added without placing in the act that which has been omitted by Congress.* * * * *

The great stress of the argument for the defendants on this branch of the case has been to show, if possible, some reason in the attendant circumstances, or some fact existing in the nature of railroad property and business upon which to found the claim that although by the language of the statute agreements or combinations in restraint of trade or commerce are included, the statute really means to declare illegal only those contracts, etc., which are in unreasonable restraint of trade. In order to do this the defendants call attention to many facts which they have already referred to in their argument, upon the point that railroads were not included at all in the statute. They again call attention to the fact of the peculiar nature of railroad property. When a railroad is once built, it is said it must be kept in operation; it must transport property, when necessary in order to keep its business at the smallest price and for the narrowest profit, or even for no profit, provided running expenses can be paid, rather than not do the work; that railroad property cannot be altered for use for any other purpose, at least without such loss as may fairly be called destructive; that competition, while, perhaps, right and proper in other business, simply leads in railroad business to financial ruin and insolvency, and to the operation of the road by receivers in the interest of its creditors instead of in that of its owners and the public. * * * *

To the question why competition should necessarily be conducted to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that if competing railroad companies be left subject to the sway of free and unrestricted competition the results above foreshadowed necessarily happen from the nature of the case; that competition being the rule, each company will seek business to the extent of its power, and will underbid its rival in order to get the business, and such underbidding will act and react upon each company until the prices are so reduced as to make it impossible to prosper or live under them; that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and

while doing so to see its patrons leave for rival roads who are obtaining its business by offering less rates for doing it than can be afforded and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition efforts will be made in the direction of meeting the underbidding of its rival until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves, so that companies may be allowed to save themselves and to agree not to attack each other, but to keep up reasonable and living rates for the services performed. It is said that as railroads have a right to charge reasonable rates it must follow that a contract among themselves to keep up their charges to that extent is valid. Viewed in the light of all these facts it is broadly and confidently asserted that it is impossible to believe that Congress or any other intelligent and honest legislative body could ever have intended to include all contracts or combinations in restraint of trade, and as a consequence thereof to prohibit competing railways from agreeing among themselves to keep up prices for transportation to such a rate as should be fair and reasonable.

These arguments, it must be confessed, bear with much force upon a policy of an act which should prevent a general agreement upon the question of rates among competing railroad companies to the extent simply of maintaining those rates which were reasonable and fair.

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred and the rate itself differs in different localities. Which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road if honestly expended or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such a case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charges to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, fur-

nish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill will of the road itself in all his future dealings with it. To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves. * * * * The general reasons for holding agreements of this nature to be invalid even at common law, on the part of railroad companies are quite strong, if not entirely conclusive.

Considering the public character of such corporations the privileges and franchises which they have received from the public in order that they might transact business, and bearing in mind how closely and immediately the question of rates for transportation effects the whole public, it may be urged that Congress had in mind all the difficulties which we have before suggested of proving the unreasonableness of the rate, and might in consideration of all the circumstances have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce regardless of the question whether such agreements were reasonable or the reverse. * * * *

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously effected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.

As a result of this review of the situation, we find two very widely divergent views of the effects which might be expected to result from declaring illegal all contracts in restraint of trade, etc.; one side predicting financial disaster and ruin to competing railroads, including thereby the ruin of shareholders, the destruction of immensely valuable properties, and the consequent prejudice to the public interest; while on the other side predictions equally earnest are made that no such mournful results will follow, and it is urged

that there is a necessity, in order that the public interests may be fairly and justly protected, to allow free and open competition among railroads upon the subject of the rates for the transportation of persons and property. * * * *

The conclusion which we have drawn from the examination above made into the question before us is that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature. * * * *

Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

For the reasons given, the decree of the United States Circuit Court of Appeals and the Circuit Court for the District of Kansas must be reversed, and the case remanded to the circuit court for further proceedings in conformity with this opinion.

NORTHERN SECURITIES COMPANY *v.* UNITED STATES.

193 U. S., 197. 1903.

Suit was brought by the United States Government against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin, and other co-defendants. The object of the proceeding was to enforce against the defendants the provisions of the act of July 2, 1890, known as the "Anti-Trust Act."

The stockholders of the Great Northern and Northern Pacific Railway Companies, corporations with competing and practically parallel railway lines extending from the Great Lakes to Puget

Sound, had organized the Northern Securities Company, as a holding company for the shares of stock of the two competing companies. The plan of combination was to transfer to the Securities Company the shares of stock of the constituent companies, and the stockholders of each company were to receive in return upon an agreed basis of value shares of the holding company. In this way, the Northern Securities Company became the holder and custodian of more than nine-tenths of Northern Pacific Company stock, and three-fourths of Great Northern Company stock.

The United States Government charged that the combination was in violation of the Anti-Trust law, in that it prevented free competition among carriers engaged in interstate commerce, and that it was a conspiracy to monopolize trade and commerce among the several States.

The United States Circuit Court in Minnesota sustained the contention of the government. An appeal was then taken to the Supreme Court of the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; so much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding company, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which the competition between the constituent companies would cease. * * * No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise. * * * in restraint of commerce among the several States or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a combination in restraint of interstate and international commerce, and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such a combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the

United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory. * * * *

Judgment of lower court is affirmed.

UNITED STATES *v.* UNION PACIFIC RAILROAD CO.
UNION PACIFIC MERGER CASE.

226 U. S., 61. December 2, 1912.

This case was begun in the United States Circuit Court for the District of Utah to enforce the provisions of the so-called Sherman Anti-Trust Act of 1890 against certain alleged conspiracies and combinations in restraint of interstate commerce. The case in its principal aspect grew out of the purchase by the Union Pacific Railroad Company in the month of February, 1901, of certain shares of the capital stock of the Southern Pacific Company from the devisees under the will of Collis P. Huntington, who had formerly owned the stock. Other shares of Southern Pacific stock were acquired at the same time, the holding of the Union Pacific amounting to 750,000 shares, or about 37½ per cent. (subsequently increased to 46 per cent.) of the outstanding stock of the Southern Pacific Company. The stock was held for the Union Pacific Company by one of its proprietary companies, the Oregon Short Line Railroad Company.

Prior to the stock purchase in 1901 the Union Pacific system may briefly be described as a line of railroad from the Missouri River to the Pacific Coast; namely, from Omaha, Nebraska, or perhaps more strictly from Council Bluffs, Iowa; and from Kansas City, Missouri, to Ogden, Utah, and Portland, Oregon, with various branches and connections and a line of steamships from Portland to San Francisco, California, and from Portland to the Orient; and a line of steamships from San Francisco to the Orient (the Occidental & Oriental Steamship Company), in which the Union Pacific and the Southern Pacific each owned a half interest. The main line from Council Bluffs to Ogden, a little over 1,000 miles in length, with the branch from Kansas City, through Denver, Colorado, to Cheyenne, Wyoming, on the main line, was owned and operated by the Union Pacific; the line from Granger, Wyoming, on the main line of the Union Pacific, to Huntington, Oregon, was owned and operated by the Oregon Short Line Railroad Company, the capital stock of which was owned by the Union Pacific; and the line from Huntington to Portland was owned and operated by the Oregon Railroad & Navigation Company, the stock ownership of which was in the Oregon Short Line. The boat line from Portland to San Francisco and to the Orient, the Portland & Asiatic Steamship Company, was organized early in 1901, its stock being owned by the Oregon Railroad & Navigation Company.

The Southern Pacific Company, a holding company of the State of Kentucky, also engaged in operating certain lines of railroad under lease, controlled a line of railroad extending from New

Orleans through Louisiana, Texas, New Mexico, Arizona, California, and Oregon to Portland, reaching Los Angeles and San Francisco, with several branch lines and connections extending into tributary territory. A line of boats running between New York and New Orleans was also owned and operated by the Southern Pacific, and later the same ships entered the port of Galveston, where also the Southern Pacific reached tidewater, and it had branches extending to various points in Northern Texas, connecting with other lines of road. The Southern Pacific also operated, under lease, the railroad of the Central Pacific Railway Company, all the stock of which is owned by the Southern Pacific. The lines of the Central Pacific consisted of the road from San Francisco to Ogden, about 800 miles in length, and connecting at the latter place with the Union Pacific and the Denver & Rio Grande Railroad Company's line. It also had various branches in and about California, aggregating in mileage about 500 miles. The Southern Pacific also owned a majority of the stock of the Pacific Mail Steamship Company, which operated a line of steamships plying to ports in the Orient and running between San Francisco and Panama.

The government contended that prior to the stock purchase described above, the Union Pacific and Southern Pacific were competing systems of railroad engaged in interstate commerce, and that since the acquisition of the stock the dominating power of the Union Pacific had eliminated competition between the two systems, which made the combination one in restraint of trade within the meaning of the Anti-Trust Act.

The lower court dismissed the government's suit, from which decision an appeal was taken to the United States Supreme Court.

MR. JUSTICE DAY delivered the opinion of the court.

In the *Northern Securities Co. v. United States*, 193 U. S. 197, this court dealt with a combination differing in character from that considered in the *Trans-Missouri* and *Joint Traffic* Cases, and it was there held that the transfer to a holding company of the stock of two competing interstate railroads, thereby effectually destroying the power which had theretofore existed to compete in interstate commerce, was a restraint upon such commerce, and Mr. Justice Harlan, announcing the affirmance of the decree of the circuit court, said (p. 337):

"In all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Nor can this court say that such a rule is prohibited by the Constitution, or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution. Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and

commerce is an economic question which this court need not consider or determine."

Mr. Justice Brewer, who delivered a concurring opinion, while expressing the view that the former cases were rightly decided, said that they went too far in giving the reasons for the judgments, and declared his view that Congress only intended to reach and destroy those contracts which were in direct restraint of trade, unreasonable, and against public policy. He was nevertheless emphatic in condemning the combination effected by the Northern Securities Company and the transfer of stocks to it, which policy he declared might be extended until a single corporation with stocks owned by three or four parties would be in practical control of both roads; or viewing the possibilities of combination, the control of the whole transportation system of the country. * * * *

We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable. *Swift & Co. v. United States*, 196 U. S. 375.

Nor do we think it can make any difference that instead of resorting to a holding company, as was done in the Northern Securities Case, the controlling interest in the stock of one corporation is transferred to the other. The domination and control, and the power to suppress competition, are acquired in the one case no less than in the other, and the resulting mischief, at which the statute was aimed, is equally effective whichever form is adopted. The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce. This court has repeatedly held this general phraseology embraces all forms of combination, old and new. "In view of the many new forms of contracts and combinations," said the Chief Justice in the Standard Oil Case (p. 59), "which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation." A more effectual form of combination to secure the control of a competing railroad than for one road to acquire a dominating stock interest in the other could hardly be conceived. If it is true, as contended by the government, that a stock interest sufficient for the purpose was obtained in the Southern Pacific Company, with a view to securing the control of that company and thus destroying or restricting competition with the Union Pacific in interstate trade, the transaction was, in our opinion, within the terms of the statute. * * * *

It is said, however, and this was the view of the majority of the

circuit judges, that these railroads were not competing, but were engaged in a partnership in interstate carriage as connecting railroads; and it was further said that the Southern Pacific, because of its control of the line from Ogden to San Francisco and other California points, was the dominating partner. A large amount of the testimony in this voluminous record was given by railroad men of wide experience, business men and shippers, who, with practical unanimity, expressed the view that, prior to the stock purchase in question, Union Pacific and Southern Pacific systems were in competition, sharp, well-defined, and vigorous, for interstate trade. To compete is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific, through its agents, advertisements, and literature, had undertaken to obtain transportation for its "Sunset" or southerly route across the continent, while the Union Pacific had endeavored in the same territory to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast.

To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.

Competition between two such systems consists not only in making rates, which, so far as the shipper was concerned, the proof shows, were by agreement fixed at the same figure whichever route was used, and then apportioned among the connecting carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight, and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. The inducement to maintain these points of advantage—low rates, superiority of service and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment.

The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates (*United States v. Joint Traffic Asso.* 171 U. S. 577). It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the

combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act. *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 676; *United States v. Joint Traffic Asso. supra.* * * * *

It is further contended that the real purpose in acquiring the stock was not to obtain the control of the Southern Pacific as a system, but to secure the California connection via Ogden, and to avoid the situation which has been termed the "bottling up" of the Union Pacific at that point. That process, we have undertaken to show, might have been detrimental to the Southern Pacific business in California, as it is apparent that much of it would not have gone over the "Sunset" route of the Southern Pacific. It may be conceded, as is undoubtedly the fact, that the connection at Ogden was a valuable one, the one practically and largely, if not exclusively, used in the transportation of freight to and from the State of California; but this case is not to be decided upon the theory that only so much of the Southern Pacific system as operates between Ogden and San Francisco has been acquired. Conceding for this purpose that it might have been legitimate, had it been practicable, to acquire the California connection at Ogden over the old Central Pacific line, we must consider what was in fact done; and that was the purchase of the controlling interest in the entire Southern Pacific system, consisting of ocean and river lines with a mileage of about 3,500 miles, and railroad lines aggregating over 8,000 miles, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific Coast points, with various branches and connections, besides a steamship line from San Francisco to Panama and from San Francisco to the Orient, and a half interest in another line between the two latter points. The purchase may be judged by what it in fact accomplished, and the natural and probable consequences of that which was done. Because it would have been lawful to gain, by purchase or otherwise, an entrance into California over the old Central Pacific, does not render it legal to acquire the entire system, largely engaged in interstate commerce in competition with the purchasing road. * * * *

Reaching the conclusion that the Union Pacific thus obtained the control of a competing railroad system and thereby effected a combination in restraint of trade, within the meaning of the Sherman Act, the question remains, What should be the relief in such circumstances? The remedies provided in the statute, generally speaking, were said by this court in the *Standard Oil Case*, *supra*, to be twofold in character (p. 78):

"1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully ob-

tained has brought and will continue to bring about." * * * *

As to the suggestion made at the oral argument by the Attorney General, in response to a query from the court as to the nature of the decree, that one might be entered which, while destroying the unlawful combination in so far as the Union Pacific secured control of the competing line of road extending from New Orleans and Galveston to San Francisco and Portland, would permit the Union Pacific to retain the Central Pacific connection from Ogden to San Francisco, and thereby to control that line to the coast, thus effecting such a continuity of the Union Pacific and Central Pacific from the Missouri River to San Francisco as was contemplated by the acts of Congress under which they were constructed, it should be said that nothing herein shall be considered as preventing the government or any party in interest, if so desiring, from presenting to the district court a plan for accomplishing this result, or as preventing it from adopting and giving effect to any such plan so presented.

Any plan or plans shall be presented to the district court within three months from the receipt of the mandate of this court; failing which, or, upon the rejection by the court of plans submitted within such time, the court shall proceed by receivership and sale, if necessary, to dispose of such stock in such wise as to dissolve such unlawful combination.

Decree reversed.

Note.—On January 6, 1913, the Supreme Court passed upon a plan offered by the Union Pacific Railroad Company of complying with the court's decree by selling or distributing as a stock dividend to its own stockholders the shares of stock of the Southern Pacific Company held by it as described in the preceding case. The court rejected the plan, holding that the stockholders might delegate to their directors the same authority and control as when the company held the stock, and said: "We are of opinion, however, and now hold, that the proposed plan of disposition of the entire stock holding of the Union Pacific Company in the Southern Pacific Company by transfer to the stockholders of the Union Pacific Company will not so effectually end the combination as to comply with the decree heretofore ordered by this court to be entered." Subsequently the Union Pacific disposed of the stock by exchanging a part thereof with the Pennsylvania Railroad Company for Baltimore and Ohio Railroad Company stock held by the latter, and the balance of Southern Pacific stock was sold through an underwriting syndicate.

THE STANDARD OIL COMPANY OF NEW JERSEY, ET
AL., APPELLANTS, *vs.* THE UNITED STATES.

SUPREME COURT OF UNITED STATES.

221 U. S., 1. (May, 1911.)

This proceeding was instituted by the United States Government against the Standard Oil Corporations in the Circuit Court of the

United States for the Eastern District of Missouri. The object of the action was to dissolve the Standard Oil Company of New Jersey, which was a holding company for all other companies, and which the government attacked as existing in violation of the Sherman Anti-Trust Act of July 2nd, 1890. Corporations known as the Standard Oil Company of New Jersey, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio, and sixty-two other corporations and partnerships, John D. Rockefeller, William Rockefeller and five individuals, were named as defendants. The government charged that these various parties were engaged in conspiring "to restrain the trade and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in other products of petroleum, among the several States and Territories of the United States and the District of Columbia, and with foreign nations, and to monopolize the said commerce." The conspiracy was alleged to have been formed about the year 1870 by John D. Rockefeller, William Rockefeller and Henry M. Flagler. The detailed facts concerning the conspiracy were divided into three periods: The first from 1870 to 1882; the second from 1882 to 1899; the third period from 1899 to the time of the institution of the proceeding.

As to the First Period (1870 to 1882), it was claimed that John D. and William Rockefeller and several other individual defendants who prior to 1870 composed three separate partnerships, organized in the year 1870 a corporation known as the Standard Oil Company of Ohio and transferred to that company the business of the three partnerships. The other individual defendants soon afterwards became participants in the combination and transferred property to the corporation in return for an interest in the Standard Oil Company of Ohio. By this means by the year 1872 the combination had acquired all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio. That by the power thus obtained, the combination secured from the railroads large preferential rates and rebates over their competitors, so that such competitors were forced either to become members of the combination or were driven out of business. From time to time, the combination acquired a large number of refineries of crude petroleum situated in New York, Pennsylvania, Ohio and elsewhere, and the control of the pipe lines for transporting oil from the oil fields to the refineries in Cleveland, Pittsburg, Titusville, Philadelphia, New York and New Jersey. Some of the properties acquired were put in the name of the Standard Oil Company of Ohio, some in the name of the corporations and partnership affiliated therewith, and others were left in the name of the original owners, who had become stockholders in the Standard Oil Company and thus members of the combination. Therefore, during the period named, the combination

had obtained a complete mastery over the oil industry, controlling 90 per cent. of the business of producing, shipping, refining, and selling petroleum and its products, and was thus enabled to fix the price of crude and refined petroleum, and to restrain and monopolize all interstate commerce in those products.

As to the Second Period (1882 to 1899), it was asserted the various defendants entered into a contract and trust agreement, by which various independent firms, corporations, partnerships, and individuals engaged in the oil business, turned over the management of their business to nine trustees, composed chiefly of the individual defendants. The trust agreement made provision for the method of controlling and managing the various properties and business. It provided for the issue of certificates to represent the interest of the parties. Subsequently the trustees organized the Standard Oil Company of New York with a capital stock of \$3,000,000, and the Standard Oil Company of New Jersey having a capital stock of \$5,000,000, subsequently increased to \$10,000,000.

In the Third Period (1899 to date of proceeding), pursuant to the conspiracy, the individual defendants operated through the Standard Oil Company of New Jersey as a holding company, which company obtained and acquired the majority of the stock of the various corporations engaged in the oil business among the various States. The trust agreement mentioned in the second period of the conspiracy came to an end and the stock of the various companies controlled under its provisions was transferred to the Standard Oil Company of New Jersey, whose capital was increased from \$10,000,000 to \$110,000,000. In addition to these facts showing how the Standard Oil Trust had monopolized and restrained interstate commerce in petroleum and its products from 1882 to 1899, and the Standard Oil Company of New Jersey had followed the same course since 1899, the government set forth that the various means by which competition was further destroyed were as follows,—by rebates, preferences and other discriminatory practices in favor of the combination by railroad companies; by restraint and monopolization by control of pipe lines,—by contracts with competitors in restraint of trade,—by unfair methods of competition, such as local price cutting at the points where necessary to suppress competition,—by espionage of the business of competitors,—by the operation of bogus independent companies,—by the payment of rebates on oil,—and by the division of the United States into districts and limiting the operations of the various companies to particular districts.

The decree of the Circuit Court was in favor of the government, and an order directing the dissolution of the Standard Oil Company of New Jersey and restraining all the parties defendant from such acts of conspiracy in restraint of trade was made. From this decree an appeal was carried to the Supreme Court of the United States.

MR. CHIEF JUSTICE WHITE (after stating the above facts) delivered the opinion of the court.

Duly appreciating the situation just stated, it is certain that only one point of concord between the parties is discernable, which is, that the controversy in every aspect is controlled by a correct conception of the meaning of the first and second sections of the Anti-Trust Act. We shall therefore—departing from what otherwise would be the natural order of analysis—make this one point of harmony the initial basis of our examination of the contentions, relying upon the conception that by doing so some harmonious resonance may result adequate to dominate and control the discord with which the case abounds. That is to say, we shall first come to consider the meaning of the first and second sections of the Anti-Trust Act by the text, and after discerning what by that process appears to be its true meaning, we shall proceed to consider the respective contentions of the parties concerning the act, the strength or weakness of those contentions, as well as the accuracy of the meaning of the act as deduced from the text in the light of the prior decisions of this court concerning it. When we have done this we shall then approach the facts.

Following this course, we shall make our investigation under four separate headings: First. The text of the 1st and 2nd sections of the act, originally considered, and its meaning in the light of the common law and the law of this country at the time of its adoption. Second. The contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon which they rely. Third. The application of the statute to the facts; and, Fourth. The remedy, if any, to be afforded as the result of such application.

First. The text of the act and its meaning.

We quote the text of the first and second sections of the act, as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

It is certain that at a very remote period the words contract in restraint of trade in England came to refer to some voluntary restraint put in contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public, as well as to the individuals who made them. In the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminus with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable the contract was held to be valid.

Monopolies were defined by Lord Coke as follows:

"A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade. (3 Inst. 1881.)" * * * *

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English constitution is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least so far as the necessities of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, (one of the wrongs arising from monopoly), it came to be that laws were passed relating to offenses such as forestalling, regrating and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to

the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. * * * *

Generalizing these considerations, the situation is this: 1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessities of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly, that is an undue enhancement of price. 3. That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly and the same considerations caused monopoly because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade.

Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary. As to the first section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce * * * * is hereby declared to be illegal."

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in-restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which

an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibition of the second embraces "every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations." By reference to the terms of Section 8 it is certain that the word "person" clearly implies a corporation as well as an individual.

And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it

and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Second. The contentions of the parties as to the meaning of the statute and the decisions of this court relied upon concerning those contentions.

In substance, the propositions urged by the Government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided.

It is said the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States v. Freight Association*, 166 U. S. 290, and *United States v. Joint Traffic Association*, 171 U. S. 505. Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute.

And in order, not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the Freight Association and Joint Traffic cases from the context and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified. We see no possible escape from this conclusion if we are to adhere to the many cases decided in this court in which the Anti-Trust law has been applied and enforced and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the Anti-Trust law, aside from the contention as to the Freight Association and Joint Traffic cases, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how

the statute may in the future be enforced and the public policy which it establishes be made efficacious.

We come then to the third proposition requiring consideration, viz.:

Third. The facts and the application of the statute to them.

Beyond dispute the proofs establish substantially as alleged in the bill the following facts:

1. The creation of the Standard Oil Company of Ohio;
2. The organization of the Standard Oil Trust of 1882, and also a previous one of 1879, not referred to in the bill, and the proceedings in the Supreme Court of Ohio, culminating in a decree based upon the finding that the company was unlawfully a party to that trust; the transfer by the trustees of stocks in certain of the companies; the contempt proceedings; and, finally, the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations in exchange for its certificates.

The vast amount of property and the possibilities of far reaching control which resulted from the facts stated are shown by the statement which we have previously annexed concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust and which came therefore to be held by the New Jersey corporation. But these statements do not with accuracy convey an appreciation of the situation as it existed at the time of the entry of the decree below, since during the more than ten years which elapsed between the acquiring by the New Jersey corporation of the stock and other property which was formerly held by the trustees under the trust agreement, the situation of course has somewhat changed, a change which when analyzed in the light of the proof, we think, establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence, that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products.

Giving to the facts just stated, the weight which it was deemed they were entitled to, in the light afforded by the proof of other cognate facts and circumstances, the court below held that the acts and dealings established by the proof operated to destroy the "potentiality of competition" which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade in violation of the first section of the act, but also to be an attempt to monopolize and a monopolization bringing about a perennial violation of the second section.

We see no cause to doubt the correctness of these conclusions,

considering the subject from every aspect, that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have construed it upon the inferences deducible from the facts.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other, and if the inference which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

We are thus brought to the last subject which we are called upon to consider, viz.:

Fourth. The remedy to be administered.

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, 196 U. S. 375. But in a case like this where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies twofold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

The court below by virtue of sections 1, 2 and 4 of its decree, adjudged that the New Jersey corporation in so far held the stock of the various corporations, recited in sections 2 and 4 of the decree, or controlled the same was a combination in violation of the first section of the act, and an attempt to monopolize or a monopolization contrary to the second section of the act. It commanded the dissolution of the combination, and therefore in effect, directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same, the stock

which had been turned over to the New Jersey company in exchange for its stock.

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the first section and an attempt to create a monopoly or to monopolize under the second section and commanded the dissolution of the combination, the decree was clearly appropriate.

We think that in view of the magnitude of the interests involved and their complexity that the delay of thirty days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months. So, also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation, but by all the subsidiary companies, until the dissolution of the combination by the transfer of the stocks in accordance with the decree should not have been awarded.

Our conclusion is that the decree below was right and should be affirmed, except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance, with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree.

And it is so ordered.

Note.—As a sequel to the Standard Oil decision, on November 15, 1911, the Oil Trust presented to the government a plan providing for its "dissolution." Under this plan, the Standard Oil Company of New Jersey, as the great stock holding company, gave up its control over the subsidiary oil companies, so that thereafter such companies should conduct their business as independent concerns in competition with each other in the oil industry. Theoretically the oil trust passed out of existence by this plan, though the Standard Oil Company of New Jersey still retained its existence as a corporation. The stock held by the company was distributed and each stockholder in the Standard Oil Company received his proportionate share of the stock in each of the subsidiary oil companies. The plan was approved by the government and went into operation on December 1, 1911.

UNITED STATES *vs.* AMERICAN TOBACCO COMPANY AND OTHERS.

221 U. S. 106. May, 1911.

The United States Government brought suit in the Circuit Court of the United States for the Southern District of New York to dissolve a combination in control of the tobacco industry, alleged to be in violation of the first and second sections of the Sherman Anti-

Trust law of July 2nd, 1890. The defendants, to the suit were twenty-nine individuals, sixty-five American corporations, most of them created in the State of New Jersey, and two English corporations.

The primary defendant was the American Tobacco Company, a New Jersey corporation, together with five principal accessory corporations, viz., the American Snuff Company, the American Cigar Company, the American Stogie Company, the MacAndrews & Forbes Company, and the Conley Foil Company, all of which were corporations of New Jersey. The government contended that the combination was in restraint of trade, not alone because of the nature and character of the American Tobacco Company and the enormous power which it exerted in the tobacco business because of its stock ownership in the five great accessory corporations, but also because of its control over the fifty-nine subsidiary corporations engaged in the tobacco trade, owing to the fact that the greater part of the stock of such subsidiary corporations was in turn owned by the five accessory corporations.

In 1890 the American Tobacco Company was formed under New Jersey laws with a capital stock of \$25,000,000. By various purchases and acquisitions of tobacco concerns doing business in the several States in the period from 1890 to 1898, the American Tobacco Company controlled the manufacture of 86 per cent. of all the cigarettes produced in the United States, above 26 per cent. of all the smoking tobacco, more than 22 per cent. of all plug tobacco, 51 per cent. of all little cigars, 6 per cent. of all snuff and fine cut tobacco, and over 2 per cent. of all cigars and cheroots. In 1898 the American Tobacco Company organized a New Jersey corporation styled the Continental Tobacco Company, with a capital of \$75,000,000, afterwards increased to \$100,000,000, and the new company took transfers to the plant, assets and business of five large and successful competing plug manufactories. In 1899 the American Tobacco Company and the Continental Tobacco Company, at an aggregate cost of fifty million dollars, bought and closed up thirty large competing tobacco concerns in the United States. Subsequently five great corporations were formed, viz., the Conley Foil Company, which supplied all the tin foil used by the combined tobacco companies; the American Cigar Company, which manufactured and distributed domestic cigars; the MacAndrews & Forbes Company, which controlled the manufacture of licorice used in plug tobacco; the American Stogie Company, which took over the stogie and tobie business of the combination, and the Consolidated Tobacco Company, which was chartered with broad powers to do business throughout the world and to guarantee the securities of the other companies of the combination. By means of the United Cigar Stores Company, the combination established itself in the retail tobacco trade with thousands of stores throughout the country. Finally, in 1904, the (old) American Tobacco Company, the Continental Tobacco Company and the Consolidated Tobacco Company

were merged into one gigantic corporation with a capital of \$180,000,000. The same methods continued to be employed which had been used from the beginning, i. e., competing concerns were purchased and closed up, or else transferred to one of the corporations controlled by the combination.

MR. CHIEF JUSTICE WHITE (after stating the above facts) delivered the opinion of the court.

That situation and the vast power which the principal and accessory corporate defendants and the small number of individuals who own a majority of the common stock of the new American Tobacco Company exert over the marketing of tobacco as a raw product, its manufacture, its marketing when manufactured, and its consequent movement in the channels of interstate commerce, indeed, relatively, over foreign commerce, and the commerce of the whole world, in the raw and manufactured products, stand out in such bold relief from the undisputed facts which have been stated as to lead us to pass at once to the second fundamental proposition which we are required to consider. That is, the construction of the anti-trust act, and the application of the act, as rightly construed, to the situation as proven in consequence of having determined the ultimate and final inferences properly deducible from the undisputed facts which we have stated.

The construction and application of the anti-trust act.

If the anti-trust law is applicable to the entire situation here presented, and is adequate to afford complete relief for the evils which the United States insists that situation presents, it can only be because that law will be given a more comprehensive application than has been affixed to it in any previous decision. This will be the case because the undisputed facts as we have stated them involve questions as to the operation of the anti-trust law not hitherto presented in any case. Thus, even if the ownership of stock by the American Tobacco Company in the accessory and subsidiary companies, and the ownership of stock in any of those companies among themselves, were held, as was decided in the Standard Oil Company case, to be a violation of the act, and all relations resulting from such stock ownership were therefore set aside, the question would yet remain whether the principal defendant, the American Tobacco Company, and the five accessory defendants, even when divested of their stock ownership in other corporations, by virtue of the power which they would continue to possess, even although thus stripped, would amount to a violation of both the 1st and 2nd sections of the act. Again, if it were held that the corporation, the existence whereof was due to a combination between such companies and other companies, was a violation of the act, the question would remain whether such of the companies as did not owe their existence and power to combinations, but whose power alone arose from the exercise of the right to acquire and own prop-

erty, would be amenable to the prohibitions of the act. Yet further: Even if this proposition was held in the affirmative, the question would remain whether the principal defendant, the American Tobacco Company, when stripped of its stock ownership, would be, in and of itself, within the prohibitions of the act, although that company was organized and took being before the anti-trust act was passed. Still further, the question would yet remain whether particular corporations which, when bereft of the power which they possessed as resulting from stock ownership, although they were not inherently possessed of a sufficient residuum of power to cause them to be, in and of themselves, either a restraint of trade or a monopolization or an attempt to monopolize, should nevertheless be restrained because of their intimate connection and association with other corporations found to be within the prohibitions of the act.

The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from, and the promotion of the wrongs which the statute was intended to guard against, which would result from giving to the statute a narrow, unreasoning and unheard-of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction—the rule of reason which was applied in the Standard Oil case, the application of which rule to the statute we now, in the most unequivocal terms, re-express and re-affirm.

Coming, then, to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because, although it was held in the Standard Oil case that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom, and the right to make which was necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the 1st and 2nd sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibition of the law,

without regard to the garb in which such acts are clothed. That is to say, it was held that, in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape, by any indirection, the prohibitions of the statute.

Considering, then, the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which are assailed, were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion so overwhelmingly results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because, alone, of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established.

Leading as this does to the conclusion that the assailed combination in all its aspects—that is to say, whether it be looked at from the point of view of stock ownership or from the standpoint of the principal corporation and the accessory or subsidiary corporations, viewed independently, including the foreign corporations in so far as by the contracts made by them they become co-operators in the combination—comes within the prohibitions of the 1st and 2nd sections of the anti-trust act, it remains only finally to consider the remedy which it is our duty to apply to the situation thus found to exist.

The remedy.

Under these circumstances, taking into mind the complexity of the situation in all of its aspects, and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows: 1st. That the combination, in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be de-

creed to be in restraint of trade and an attempt to monopolize and a monopolization within the 1st and 2nd sections of the anti-trust act. 2nd. That the court below, in order to give the effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. 3rd. That for the accomplishment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed sixty days. 4th. That in the event, before the expiration of the period thus fixed, a condition of disintegration in harmony with the law is not brought about, either as the consequences of the action of the court in determining an issue on the subject, or in accepting a plan agreed upon, it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce, or by the appointment of a receiver, to give effect to the requirements of the statute.

And it is so ordered.

Note.—The Supreme Court in its decree ordered the United States Circuit Court in New York to hear the parties to the case “for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and recreating a new condition not repugnant to law.” Accordingly, on November 9th, 1911, the American Tobacco Company presented to the Circuit Court a plan providing for the disintegration of the Tobacco Trust. The plan with some modifications was found acceptable to the Attorney-General of the United States, representing the government, and by order of the court was put into operation. Under its provisions, the properties of the trust were divided among several corporations legally distinct from each other, and the stock of these corporations was distributed pro rata among the stockholders of the American Tobacco Company. By this means, it was claimed, a state of competition was restored in the tobacco industry. The principal new corporations were the American Tobacco Company reorganized, the Lorillard Company, the Liggett and Myers Company, and the Reynolds Tobacco Company. The plan was bitterly opposed by the “Independent Tobacco Concerns,” who claimed that each corporation as above was a trust and monopoly in itself. A petition was presented to the Supreme Court to review the action of the Circuit Court, but the petition was not entertained by the Supreme Court.

UNITED STATES *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

224 U. S., 383. 1912.

The United States Government filed a bill in equity in the Circuit Court of the United States for the Eastern District of Missouri to enforce the provisions of the Sherman Anti-Trust Act against the Terminal Railroad Association of St. Louis as principal defendant and thirty-eight corporate and individual defendants. The terminal association was organized in 1889 for the express purpose of acquiring the properties of several independent terminal companies at St. Louis with a view to combining and operating them as a unitary system.

Altogether there are twenty-four lines of railway converging at St. Louis and about one-half of these lines have their termini on the Illinois side of the Mississippi River, while the others coming from the west and north have their termini either in the city or on its northern edge. The river, once the great highway of the city's commerce, is now the great obstacle to connection between the termini of lines on opposite sides of the river and any entry into the city by eastern lines. The cost of construction and maintenance of railroad bridges over so great a river makes it impracticable for every road desiring to enter or pass through the city to have its own bridge. The solution of this problem to the city of St. Louis was the building and maintenance of railroad toll bridges open to the use of any and all lines upon equal terms. There already existed a car ferry known as the Wiggins Ferry Company, which had switching yards and terminal facilities and was able to interchange traffic between the railroad systems on opposite sides of the river, but not to the extent required. So there was built a bridge called the Eads Bridge, which was a toll bridge and open to use by carriers on equal terms. But it was essential to connect this bridge with the various railroad termini in the city. Therefore independent companies called terminal companies were organized which built and operated lines making the necessary connections. Thus, though the bridge might be used by all upon equal terms, it was accessible only by means of the several terminal companies operating lines connecting it with the railroad termini. A second bridge was constructed, called the Merchants Bridge, but like the Eads Bridge, it had no rail connections with any of the existing railroad systems, and these facilities were likewise supplied by a number of independent railway companies which filled in the gaps between the bridge ends and the termini of railroads on both sides of the river. The result was that it was practically impossible for any railway company to pass through or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal companies.

The independent existence of these three terminal systems guaranteed a considerable measure of competition between them for the

business of each other, and gave to carriers and shippers some choice as to the way by which they would enter the city. The promoters of the defendant company, the Terminal Railroad Association planned to obtain the control of every feasible means of railroad access to St. Louis, or means of connecting the lines of railway on opposite sides of the river. By successive steps the association acquired the terminal railroad lines, the Eads Bridge, the Merchants Bridge, and finally the Wiggins Ferry, so that the three independent terminal systems were combined into a single system.

It was alleged that certain practices of the terminal association were arbitrary and discriminatory. The complaints related to rates for certain short hauls, rebilling at certain points, and exemption from such rates, in favor of other points, as well as general arbitrary conduct of the facilities owned and controlled. The lower court dismissed the suit of the government, thereupon an appeal was taken to the Supreme Court.

MR. JUSTICE LURTON delivered the opinion of the court:

* * * * We come, then, to the question upon which the case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the anti-trust act?

It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of inter-state commerce or an unreasonable restraint, forbidden by the Act of Congress, as construed and applied by this court in the cases of *Standard Oil Co. v. United States*, 221 U. S. 1, and *United States v. American Tobacco Co.*, 221 U. S. 106, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which that control has been exerted. * * * * We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions do not restrain, but promote commerce. * * * * While, therefore, the mere combination of several independent terminal systems into one may not operate as a restraint upon the interstate commerce which must use them, yet there may be conditions which will bring such a combination under the prohibition of the Sherman Act. The one in question, counsel say, is not antagonistic to, but in harmony with, the anti-trust act, because it expands competition by extending equal conveniences and

advantages to all shippers located upon each of the three systems for all traffic to and from St. Louis; expedites and economizes the service. * * * * The terminal properties in question are not so controlled and managed, in view of the inherent local conditions, as to escape condemnation as a restraint upon commerce. They are not under a common control and ownership. Nor can this be brought about unless the prohibition against the admission of other companies to such control is stricken out and provision made for the admission of any company to an equal control and management upon an equal basis with the present proprietary companies. (The opinion then discusses the practices of the association with respect to arbitrary charges on certain "short hauls," also an exception to these charges in the case of traffic originating in a section known as the "Green Line Territory" and also the practice of rebilling and of making a distinct hauling charge at East St. Louis. The Court finds that the violation of the anti-trust act is found principally in the methods of the administration and management of the properties and facilities of the association rather than in any inherent violation as found in the agreement consolidating the above described three systems. The opinion continues): Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the terminal company and the proprietary as shall constitute the former the bona fide agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage.

These considerations lead to a reversal of the decree dismissing the bill. This is accordingly adjudged, and the case is remanded to the district court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the terminal company, which we have pointed out as bringing the combination within the inhibition of the statute.

First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not

electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Third. By eliminating from the present agreement between the terminal company and the proprietary companies any provision which restricts any such company to the use of the facilities of the terminal company.

Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100 miles area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

Sixth. By providing that any disagreement between any company applying to become a joint owner or user, as herein provided for and the terminal or proprietary companies, which shall arise after a final decree in this cause, may be submitted to the district court upon a petition filed in this cause subject to review by appeal in the usual manner.

Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to effect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission.

Upon failure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties upon a plan for the dissolution of the combination between the terminal company, the Wiggins Ferry Company, the Merchants' Bridge Company, and the several terminal companies related to the Ferry and Merchants' Bridge Company, make such order and decree for the complete disjoinder of the three systems, and their future operation as independent systems, as may be necessary, enjoining the defendants, singly and collectively, from any exercise of control or dominion over either of the said terminal systems, or their related constituent companies, through lease, purchase, or stock control, and enjoining the defendants from voting any share in any of said companies or receiving dividends, directly or indirectly, or from any future combination of the said systems, in evasion of such decree or any part thereof.

UNITED STATES *v.* READING COMPANY.
TEMPLE IRON COMPANY *v.* UNITED STATES.
READING COMPANY *v.* UNITED STATES. ..

ANTHRACITE COAL TRUST CASE.

226 U. S. 324. December 16, 1912.

A petition in equity was filed by the United States in the circuit court of the United States for the Eastern District of Pennsylvania, for the purpose of enforcing the provisions of the Sherman Anti-Trust Act against an alleged combination of railroad and coal-mining companies formed for the purpose of restraining competition in the production, sale, and transportation of anthracite coal in commerce among the States.

The defendants originally were as follows:

The Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company, the Delaware, Lackawanna & Western Railroad Company, the Central Railroad Company of New Jersey, the Erie Railroad Company, the New York, Susquehanna & Western Railroad Company, the New York, Susquehanna & Western Coal Company, the Lehigh & Wilkes-Barre Coal Company, the Pennsylvania Coal Company, the Hillside Coal Company, the Reading Company, and the Temple Iron Company. By an amendment certain other defendants were brought in, consisting of holders of contracts made by independent operators of coal mines.

The bill alleged that anthracite coal is an article of prime necessity as a fuel, and finds its market mainly in the New England and Middle Atlantic States. The deposits of the coal, with unimportant exceptions, lie in the State of Pennsylvania, but do not occupy a continuous field, though found in certain counties adjoining in the eastern half of the State, and embrace an area of 484 square miles. This coal region is from 150 to 250 miles from tide water. The region itself is broken and mountainous, and the natural conditions and character of the deposits are such that the mining and reduction of the coal to suitable sizes for domestic use require very large amounts of capital. Its value commercially is dependent, in a large degree, upon quick and cheap transportation to convenient shipping points at tide water, from whence it may be distributed to the great consuming markets of the Atlantic Coast States.

The whole problem of advantageously developing these deposits and supplying the eastern demand for fuel was one which presented enormous difficulties. From an early day it has been the settled policy of the State of Pennsylvania to encourage the development of this coal region by canal and railroad construction, which would furnish transportation to convenient shipping points at tidewater. One of the defendant carriers, the Delaware, Lackawanna & Western Company, was given the power to acquire coal lands and engage in the business of mining and selling coal in addition to the business

of a common carrier, and all railroad companies were permitted to aid in the production of coal by assisting coal mining companies through the purchase of capital stock and bonds. Thus, it has come about that the defendant carriers not only dominate the transportation of coal from this anthracite region to the great distributing ports at New York harbor, but also through their controlled coal-producing companies, *produce and sell about 75 per cent. of the annual supply of anthracite.* As a further direct consequence of the relation between coal-producing and coal-transporting companies, it has come about that the defendant carrier companies and the coal-mining companies affiliated with the carrier companies now own or control about 90 per cent. of the entire unmined area of anthracite, distributed, according to the averments of the petition, as follows:

Reading Company.....	44	per cent.
Lehigh Valley Company.....	16.87	per cent.
Del., L. & Western Company.....	6.55	per cent.
Central Railroad of New Jersey.....	19	per cent.
Erie Railroad	2.59	per cent.
N. Y. S. & Western Railroad.....	.54	per cent.

89.55 per cent.

In addition to the great coal-mining companies subsidiary to one or another of the defendant carrier companies, there are a large number of independent coal operators whose aggregate production from coal lands, in part leased from the railroad companies or the railroad-controlled coal-producing companies, amounts to about 20 per cent. of the annual anthracite supply. These independent operators are said to no longer have the power to compete with the carrier defendants and their subsidiary coal companies, because a large proportion of them have severally entered into contracts with one or the other of the carrier or coal-mining companies defendant for the sale of the entire product of their mines for the consideration of 65 per cent. of the average market price at tide water. * * * *

In 1898 many of the independent coal operators in the Wyoming or northern coal field became dissatisfied with the transportation and market conditions under which they were obliged to conduct their collieries. Many contracts for the sale of their coal to the defendant coal companies had expired or were about to expire, and they demanded either lower freight rates or better prices from the coal companies. A competing line of railway from the northern or Wyoming zone of the anthracite region to a point on the Delaware River, where connection would be made with two or more lines extending to shipping points at New York harbor, was projected as a means of relieving the situation. The New York, Wyoming & Western Railroad was accordingly incorporated. Large subscriptions of stock were taken, the line in part surveyed, parts of the right-of-way procured, and a large quantity of steel rails contracted for. As the road was to be mainly a coal-carrying road, support

from coal-mining companies was essential. Its chief backing came from independent coal operators. The most important and influential of them was the firm of Simpson & Watkins, who controlled and operated eight collieries in the region, having an annual output of more than a million tons. The time for such a competing means of transportation was auspicious. Much of the output of the district not tied up by contracts of sale or transportation was pledged to this project and much more was promised.

The construction of this projected independent railroad would not only have introduced competition into the transportation of anthracite coal to tide water, but it would have enabled independent operators reached by it to sell their coal at distributing points in free competition with the defendant coal companies.

The defendant companies combined together for the purpose of shutting out the proposed railroad, and preventing competition with them in the transportation of coal from the mines to other States, and the sale of coal in competition with their own controlled coal in the markets of other States. The plan devised was to detach from the enterprise the powerful support of Simpson & Watkins and the great tonnage which their co-operation would give to the new road, by acquiring the coal properties and collieries controlled by that great independent firm of operators. This would not only strangle the project, but secure them forever against new schemes induced by the large coal tonnage produced by these eight collieries, and secure not only that tonnage for their own lines, but keep the coal forever out of competition with that of their own coal-producing companies.

The scheme was worked out with the result foreseen and intended. The capital stock of a small concern called the Temple Iron Company, aggregating only \$240,000, was all purchased. That company was then operating a small iron furnace near Reading. Its assets were meager, but its charter was a special legislative charter from the State of Pennsylvania, which gave it power to engage in almost any sort of business, and to increase its capital substantially at will. Control of that company having been secured, it was used as the instrument for the purpose intended.

The Temple Company increased its capital stock to \$2,500,000 and issued mortgage bonds aggregating \$3,500,000. Simpson & Watkins agreed to sell to the Temple Company their properties for something near \$5,000,000. They accordingly transferred to the Temple Company the capital shares in the several coal companies, holding the title to their eight collieries, and received in exchange \$2,260,000 in the shares of the Temple Company, and \$3,500,000 of its mortgage bonds, which they subsequently transferred and sold for cash. Thus the Temple Company became a mere holding company for and was entirely owned by the combination of the defendant railroad companies, each company having a proportionate interest therein. This combination of the defendants through the Temple Iron Company was effective in bringing about the desired result. The New York, Wyoming & Western Railroad Com-

pany was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained.

It was then charged by the government that the defendant companies made with nearly all of the independent operators along their lines, new contracts containing substantially uniform provisions agreed upon beforehand by the defendant carriers in concert, some of the operators contracting with one of the defendants and some with another, by which such operators "severally agreed" to deliver on cars at breakers "to one or the other of the defendant carriers, or its subsidiary coal company, all the anthracite coal thereafter mined from any of their mines now opened and operated, or which they might thereafter open and operate at a price 15 to 50 cents more than such operators could realize when shipping and selling on their own account. The object of these contracts was to control the sale of the independent output, so as to prevent it from being sold in competition with the output of their own mines.

The government asked that the combination be dissolved. The lower court held that the combination effected through the Temple Iron Company was void, but refused to hold that the contracts between the defendant companies and the independent operators were likewise illegal. In consequence, appeals were taken both by the government and the defendants to the Supreme Court.

MR. JUSTICE LURTON delivered the opinion of the court:

The defendants insist that these contracts, *i. e.*, between the defendants and the independent operators, were but the outgrowth of conditions peculiar to the anthracite coal region, and are not unreasonably in restraint of competition, but mutually advantageous to buyer and seller.

That the act of Congress does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose, was pointed out in the Standard Oil Case, 221 U. S. 1. In that case it was also said that the words "restraint of trade" should be given a meaning which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect. We reaffirm this view of the plain meaning of the statute, and in so doing limit ourselves to the inquiry as to whether this plan or system of contracts entered into according to a concerted scheme does not operate to unduly suppress competition and restrain freedom of commerce among the states.

Before these contracts there existed not only the power to compete, but actual competition between the coal of the independents and that produced by the buying defendants. Such competition was, after the contracts, impracticable. It is, of course, obvious that the law may not compel competition between these independent coal operators and the defendants, but it may at least remove illegal

barriers resulting from illegal agreements which will make such competition impracticable.

Whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. *United States v. Terminal R. Asso.*, 224 U. S. 383, 394; *Swift & Co. v. United States*, 196 U. S. 375.

In the present case the extent of the control over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the extent of the control acquired over the independent output which constituted the only competing supply, *affords evidence of an intent to suppress that competition, and of a purpose to unduly restrain the freedom of production, transportation, and sale of the article at tide water markets.*

The case falls well within not only the *Standard Oil and Tobacco Cases*, 221 U. S. 1, but is of such an unreasonable character as to be within the authority of a long line of cases decided by this court. Among them we may cite: *Northern Secur. Co. v. United States*, 193 U. S. 197; *Swift & Co. v. United States*, 196 U. S. 375; *National Cotton Oil Co. v. Texas*, 197 U. S. 115; *United States v. Terminal R. Asso.*, 224 U. S. 383, and the recent case of *United States v. Union P. R. Co.*, 226 U. S. 61.

We are thus led to the conclusion that the defendants did combine for two distinct purposes,—first, by and through the instrumentality of the Temple Iron Company, with the object of preventing the construction of an independent and competing line of railway into the anthracite region; and, second, by and through the instrumentality of the 65 per cent. contracts, with the purpose and design of controlling the sale of the independent output at tide water. * * * *

(The court then discusses the question of the several so-called "minor combinations," such as the acquisition in 1901 of a control of the Central Railroad of New Jersey by the Reading Company and holds that the lower court was guilty of no error in refusing to enjoin these transactions since they were not proved to be in furtherance of a general scheme of combination between all the defendants.)

The opinion continues as follows:

The decree of the court below is affirmed as to the Temple Iron Company combination. It is reversed as to the 65 per cent. contracts, and the case will be remanded with direction to enter a

decree canceling each of these contracts, and perpetually enjoining their further execution, and for such proceedings as are in conformity with this opinion.

Note.—In *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600 (decided June 22nd, 1914), the Supreme Court decided that the concerted, systematic, and periodic circulation by associations of retail lumber dealers, among their members, through a so-called "official report," of confidential information of the names of wholesale lumber dealers engaged in interstate trade, selling directly to consumers, violates the prohibitions of the Sherman Anti-Trust Act as a conspiracy in restraint of trade between the States. Even though each retailer belonging to the association was free to act as he saw fit, nevertheless, the court held that these reports were circulated with the intention and effect of causing the retailers to withhold their patronage from the listed wholesalers, and thus directly and appreciably impair their interstate trade. The words of Mr. Justice Day, delivering the opinion of the court in this case, are very significant when applied to cases of this character. He says (page 614): "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.' When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress."

Note.—In *Hopkins v. United States*, 171 U. S. 578. The members of the Kansas City Stock Exchange agreed under the by-laws of their organization to transact no business with traders who were not members of their association, and further to charge commissions in accordance with rates fixed by the association. The members bought live stock shipped into the State from other States and sold the same not only to the large packing houses in Kansas City, Missouri, and Kansas City, Kansas, but also shipped them to other outside markets. The Government sought to dissolve the exchange on the ground that it was a combination in restraint of interstate trade. The Supreme Court held that the local business of buying live stock at stock yards in the city by members of an exchange as commission merchants is not interstate commerce, although most of the purchases and sales are made in other States, and therefore not contrary to Sherman Anti-Trust Law.

5. Criminal Section of the Sherman Act.

UNITED STATES *v.* JAMES A. PATTEN, ET AL.
COTTON CORNER CASE.

226 U. S. 525. January 6, 1913.

This was a criminal prosecution under the Sherman Anti-Trust Act, in which the defendants were charged with engaging in a conspiracy in restraint of trade. It was alleged that the defendants were to do what is commonly called "running a corner in cotton." The court analyzed the averments in the counts of the indictment as follows:

1. The conspirators were to make purchases from speculators upon the New York Cotton Exchange of quantities of cotton for future delivery, greatly in excess of the amount available for delivery when deliveries should become due.

2. By these means an abnormal demand was to be created on the part of such sellers, who would pay excessive prices to obtain cotton for delivery upon their contracts.

3. The excessive prices prevailing upon the New York Exchange would cause similar prices to exist upon other cotton markets.

4. As a necessary and unavoidable result of their acts, said conspirators were to compel cotton manufacturers throughout the country to pay said excessive prices to obtain cotton for their needs, or else curtail their operations.

The defendants demurred to the indictment on the ground that it did not set forth an offense within the meaning of the criminal clause of the Sherman Act. On this point the contention of the defendants was sustained by the Circuit Court, whereupon the Government appealed the case to the Supreme Court.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

We come, then, to the question whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the States, and thereby to enhance artificially its price throughout the country, and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of section 1 of the Anti-Trust Act, which makes it a criminal offense to "engage in" a "conspiracy in restraint of trade or commerce among the several States." The Circuit Court, as we have seen, answered the question in the negative; and this, although accepting as an allegation of fact, rather than as a mere economic theory of the pleader, the statement in the counts that interstate trade and commerce would necessarily be obstructed by the operation of the conspiracy. The reasons assigned for the ruling, and

now pressed upon our attention, are (1) that the conspiracy does not belong to the class in which the members are engaged in interstate trade or commerce, and agree to suppress competition among themselves, (2) that running a corner instead of restraining competition, tends, temporarily at least, to stimulate it, and (3) that the obstruction of interstate trade and commerce resulting from the operation of the conspiracy, even although a necessary result, would be so indirect as not to be a restraint in the sense of the statute.

Upon careful reflection we are constrained to hold that the reasons given do not sustain the ruling, and that the answer to the question must be in the affirmative.

Section 1 of the Act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints; as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein. *Löwe v. Lawlor*, 208 U. S. 274.

"The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice have come to be considered as in restraint of trade in a broad sense."

It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests in the present case when its salient features are kept in view.

It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton,—a product of the Southern States, largely used and consumed in the Northern States. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern States. The corner was to be conducted on the Cotton Exchange in New York City, but by means

which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

As we are of opinion that the statute does embrace the conspiracy which the Circuit Court treated as charged in counts seven and eight, as construed by it, its judgment upon those counts is reversed and the case is remanded for further proceedings in conformity with this opinion.

Reversed in part.

MR. JUSTICE LURTON and MR. JUSTICE HOLMES dissenting.

UNITED STATES *v.* SIDNEY W. WINSLOW, EDWARD P.
HURD, GEORGE W. BROWN, WILLIAM BARBOUR,
AND ELMER P. HOWE.

UNITED SHOE MACHINERY COMPANY CASE.

227 U. S. 202. February 3, 1913.

A criminal proceeding under the Sherman Anti-Trust Act was begun by the United States government against the defendants, Sidney W. Winslow, Edward P. Hurd, George W. Brown, William Barbour and Elmer P. Howe, in the District Court of the United States for the District of Massachusetts. The facts upon which the prosecution was based were as follows:

For the last twenty-five years practically all the shoes worn in the United States have been made by the help of machines, grouped as lasting machines, welt-sewing machines, and outsole-stitching machines, heeling machines and metallic fastening machines, there being a large variety of machines in each group. (These machines, of course, are not alleged to do all the work of making finished shoes.) There is a great number of shoe factories, and because the machines are expensive and the best of them patented, the manufacturers have had to get them principally from the defendants. Before and up to February 7, 1899, the defendants, Winslow, Hurd and Brown, through the Consolidated and McKay Lasting Machine Company, under letters patent, made 60 per cent. of all the lasting

machines made in the United States; the defendants, Barbour and Howe, through the Goodyear Shoe Machinery Company, in like manner made 80 per cent. of all the welt-sewing machines and out-sole-stitching machines, and 10 per cent. of all the lasting machines; and the defendant, Storrow (against whom the indictment had been dismissed), through the McKay Shoe Manufacturing Company, made 70 per cent. of all the heeling machines and 80 per cent. of all the metallic fastening machines made in the United States. The defendants all were carrying on commerce among the states with such of the shoe manufacturers as are outside Massachusetts, the state where the defendants made their machines.

On February 7, 1899, the three groups of defendants above named, up to that time separate, organized the United Shoe Machinery Company, and turned over to that company the stocks and business of the several corporations that they respectively controlled. The new company now makes all the machines that had been made in different places, at a single new factory at Beverly, Massachusetts, and directly, or through subsidiary companies, carries on all the commerce among the states that had been carried on independently by the constituent companies before. The defendants have ceased to sell shoe machinery to the shoe manufacturers. Instead, they only let machines, and on the condition that unless the shoe manufacturers use only machines of the kinds mentioned, furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away. This condition they constantly have enforced. The defendants were alleged to have done the acts recited with intent unreasonably to extend their monopolies, rights, and control over commerce among the states; to enhance the value of the same at the expense of the public; and to discourage others from inventing and manufacturing machines for the work done by those of the defendants. The organization of the new company and the turning over of the stocks and business to it were alleged to constitute a breach of the Sherman act.

The lower court held that the alleged acts were not a violation of the anti-trust law, and sustained a demurrer to the indictment. An appeal was then taken to the Supreme Court.

MR. JUSTICE HOLMES delivered the opinion of the court:

The district court construed the indictment as confined to the combination of February 7; that is, simply to the merger of the companies, without regard to the leases subsequently made, and we have no jurisdiction to review this interpretation of the indictment. *United States v. Patten*, January 6, 1913, 226 U. S. 525. Hence the only question before us is whether that combination, taken by itself, was within the penalties of the Sherman act. The validity of the leases, or of a combination contemplating them, cannot be passed upon in this case.

Thus, limited, the question does not require lengthy discussion, and a large part of the argument addressed to us concerned matters not open here. On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, Paper Bag Patent Case (*Continental Paper Bag Co. v. Eastern Paper Bag Co.*) 210 U. S. 405, and it may be assumed that the success of the several groups was due to their patents having been the best. *As, by the interpretation of the indictment below and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts.* It is said that from 70 to 80 per cent. of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendants' share in commerce among the states does not appear. But taking it as true, we can see no greater objection to one corporation manufacturing 70 per cent. of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine, and to put the machine together, as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt.

Judgment affirmed.

Note.—On February 17th, 1913, the United States District Court at Cincinnati, Ohio, sentenced John H. Patterson, President of the National Cash Register Company, and twenty-eight other officials and employees of the said company to pay fines and undergo imprisonment for terms varying from three months to one year for violations of the criminal section of the Sherman Anti-Trust Law. Appeals were taken to the Circuit Court of Appeals on a number of grounds, one being that the Federal Statute of Limitations bars actions under the criminal section after three years. The Government had charged the defendants with acquiring a monopoly by an unfair system of competition whereby they drove their competitors out of the business. It was alleged that the defendants used many schemes to do this, such as harassing their competitors with unfounded patent infringement suits, organizing cash register concerns ostensibly as competitors of the National, but in reality as instruments for use in gaining the confidence and obtaining the business secrets of competitors and putting on the market registers of inferior workmanship which on the surface looked like those of their competitors, etc. The indictment charged the officers of the National Cash Register Company

with conspiring to restrain the interstate business of its competitors on the theory that there was a generic conspiracy extending over twenty years against all competitors, which, as the various competitors named in the indictment, came into existence, was directed against them specifically. The Circuit Court of Appeals held that a conviction could be had only in conspiring in restraint of the trade of such competitors as were in existence during the three years prior to the finding of the indictment, and there could be no conviction for conspiring against the competitors who ceased to exist more than three years prior to the finding of the indictment or for the generic conspiracy so far as it existed prior to the three years. As the evidence failed to show that this conspiracy could have been directed against some of the competitors named within three years prior to the indictment for the reason that some of them had ceased to exist prior thereto, and as the lower court had failed to give specific instructions to the jury that the defendants could not be found guilty for conspiring against competitors who had ceased to exist before the period of limitations, and for other technical reasons, the judgment of the lower court was reversed and the case remanded for a new trial. *Patterson v. United States*, 222 Fed. 599 (March 13th, 1915). The Government attempted to bring this decision up to the Supreme Court for review on a petition for certiorari, but the Supreme Court denied the petition on June 14th, 1915. This in effect sustained the decision of the Circuit Court of Appeals.

6. The Federal Taxing Power as Affecting Commerce.

MCCRAY *v.* UNITED STATES.

195 U. S., 27. 1904.

This case arose in the District Court of the United States for the Southern District of Ohio and was an action brought by the United States against Leo W. McCray to recover a penalty of \$50.00 for a violation of the Acts of Congress requiring that internal revenue stamps at the rate of 10 cents per pound be affixed to packages of oleomargarine, artificially colored to look like butter. The Act of Congress of August 2, 1886, after defining butter and oleomargarine, provided, as follows: "That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof. . . . The tax levied by this section shall be represented by coupon stamps," etc. The Act of May 9, 1902, amended the foregoing act by increasing the tax on oleomargarine from two to ten cents per pound, but contained this proviso: "Provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, the said tax shall be one-fourth of one cent per pound."

The government claimed that McCray had purchased for resale oleomargarine colored to look like butter, upon which there were stamps at the rate of one-fourth of a cent per pound only, whereas there should have been stamps at the rate of ten cents per pound. McCray made answer, admitting the purchase for resale of the said oleomargarine, but asserted that while it was true that the product was of a yellow color, yet this result was not caused by artificial coloring, but was solely due to the fact that the butter used in making the oleomargarine had a deep yellow color imparted to it by a substance known as Wells-Richardson improved butter color, a product the use of which in butter was not forbidden by the government. He claimed that the use of such butter did not amount to an artificial coloration of the oleomargarine, itself, within the meaning of the above statute, even though a yellow color was produced in the oleomargarine. But the principal contention of McCray was that the statutes in question were unconstitutional because they deprived him of his property without due process of law, inasmuch as the tax at the rate of ten cents per pound arbitrarily discriminated against oleomargarine in favor of butter to the extent of destroying the oleomargarine industry for the benefit of the butter industry.

The district court gave judgment in favor of the United States from which decision an appeal was taken directly to the Supreme Court because of the importance of the questions involved, arising under the Constitution.

MR. JUSTICE WHITE delivered the opinion of the court:

* * * * Leaving out of view the proviso to the 8th Section of the Act of 1886 as amended and re-enacted by the 3d Section of the Act of 1902, it is beyond question that a tax of ten cents a pound is imposed upon oleomargarine. As the product was admitted by the answer to be oleomargarine, it follows that it was subject to the tax of 10 cents a pound, unless by the proviso, the oleomargarine was of such a character as to entitle it to the benefits of a lower rate of taxation. Now, the proviso reads: "Provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound." As it was admitted that the oleomargarine was of a shade of yellow causing it to look like butter, and as it was also admitted that this shade of yellow had been imparted by an artificial coloring matter used to color the butter which formed one of the ingredients from which the oleomargarine was manufactured, it results, if the text of the statute be applied that the oleomargarine was not within the proviso because it was not free from artificial coloring matter causing it to look like butter. This necessarily follows, since the right to enjoy the lower rate of tax is made by the proviso to depend upon whether, as a matter of fact, the oleomargarine was free from artificial coloring matter, and not upon the mere method adopted for imparting the artificial

color. As the oleomargarine in question was in fact not free from artificial coloration we think that a construction which would take it out of the general rule imposing the ten cent tax upon all oleomargarine, and bring it within the exception embracing only oleomargarine free from artificial coloration, would be not an interpretation of the statute, but a disregard of its unambiguous provisions. * * * * The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said, from the beginning no case can be found announcing such a doctrine, and on the contrary, the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton v. Moore*, 178 U. S. 41, the often quoted statement of Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316, that the power of tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax, its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. * * * *

Yet again, in *Veazie Bank v. Fenno*, 8 Wall. 533, where a tax levied by Congress on the circulating notes of state banks was assailed on the ground that the tax was intended to destroy the circulation of such notes, and was, besides, the exercise of a power to tax a subject not conferred upon Congress, it was said, as to the first contention (p. 548): "It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress. The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only be pronounced contrary to the Constitution." * * * *

In *Treat v. White*, 181 U. S. 264, referring to a stamp duty levied by Congress, it was observed: "The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty, and agreements to buy, not. It is enough that Congress, in this legislation, has imposed a stamp duty upon one and not upon the other."

It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or mo-

tive. * * * * Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. * * * *

The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases (*Spencer v. Merchant*) that "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

Whilst undoubtedly both the 5th and 10th Amendments qualify in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject.

The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. *It therefore follows, that in exercising its power, no want of due process of law could possibly result, because that body chose to impose an excise on artificially colored oleomargarine and not upon natural butter artificially colored.* The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties. This was aptly pointed out in the extract heretofore made from the opinion in *Treat v. White*, 181 U. S. 264.

Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the

manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE BROWN, and MR. JUSTICE PECKHAM dissent.

7. The Federal Police Power as Affecting Commerce.

THE EMPLOYERS' LIABILITY CASE.

MONDOU *v.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

223 U. S. 1. January 15, 1912.

Four cases were brought upon writs of error to the Supreme Court of the United States to test the constitutionality of the Federal Employers' Liability Act of April 22, 1908, amended by the Act of April 5, 1910.* The case of Edgar G. Mondou against the New York, New Haven, and Hartford Railroad Company was instituted in one of the Superior Courts of the State of Connecticut to recover for personal injuries suffered by Mondou, a locomotive fireman, while in the employ of the defendant railroad company,—a common carrier engaged in commerce between some of the States. The injuries proximately resulted from the negligence of Mondou's fellow servants, also in the employ of the defendant company, and the right to be compensated for the injuries received was based solely on the Act of Congress of April 22, 1908, which prescribed the liability of common carriers to their employees. The railroad company claimed that Congress had exceeded "its power to regulate commerce by such legislation, that the acts therefore were repugnant to the Constitution, and even if the acts were valid, the suit to enforce them could not be brought in a State court." The other cases presented substantially the same questions, and were considered and decided as one with the Mondou case. They were as follows: Bessie Babcock, Administratrix *v.* Northern Pacific Railway Company, an action commenced in the Circuit Court of the United States for the District of Minnesota, which was decided against the railway company; Mary A. Walsh, Administratrix, *v.* New York, New Haven, and Hartford

Note.—The Acts of Congress of April 22, 1908, and April 5, 1910, known as "The Federal Employers' Liability Act," are contained in the Appendix.

Railroad Company, and New York, New Haven, and Hartford Railroad Company *v.* Mary A. Walsh, Administratrix, which were cross writs of error in the same case, arising in the Circuit Court of the United States for the District of Massachusetts, and taken to the Supreme Court to review a decision which was partly in favor of and partly against each party to the litigation.

MR. JUSTICE VAN DEVANTER, after stating the cases as above, delivered the opinion of the court.

The principal questions presented in these cases as discussed at the bar and in the briefs are: 1. May Congress, in the exertion of its power over interstate commerce, regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? 3. Do those regulations supercede the laws of the states in so far as the latter cover the same field? 4. May rights arising under those regulations be enforced, as of right, in the courts of the States when their jurisdiction, as fixed by local laws, is adequate to the occasion?

The clauses in the Constitution (Art. I, § 8, Clauses 3 and 18) which confer upon Congress the power "to regulate commerce . . . among the several States," and "to make all laws which shall be necessary and proper" for the purpose, have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States,—the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

3. "To regulate," in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.

6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. * * *

In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.

We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present act. It is objected that it has, (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk, have no tendency to promote the safety of the employees, or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged; and (3) because the act offends against the Fifth Amendment to the Constitution (a) by unwarrantably interfering with the liberty of contract, and (b) by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class, and all their employees engaged in such commerce in a favored class.

Briefly stated, the departure from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the

damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives.

Of the objection to these changes it is enough to observe:

First. "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113; *Martin v. Pittsburgh & L. E. R. Co.*, 203 U. S. 284; *Western U. Teleg. Co. v. Commercial Mill. Co.*, 218 U. S. 406.

Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. *Lottery Case (Champion v. Ames)*, 188 U. S. 321; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186.

We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. *The Lottawanna (Rodd v. Heartt)*, 21 Wall. 558; *Baltimore & O. R. Co., v. Baugh*, 149 U. S. 368.

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate com-

merce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern R. Co. v. United States*, 222 U. S. 20, that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*), 207 U. S. 463, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein.

Next in order is the objection that the provision in Section 5, declaring void any contract, rule, regulation, or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the Fifth Amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, and *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it.

It follows that the answer to the second of the questions before stated must be that Congress has not exceeded its power by prescribing the regulations embodied in the present act.

The third question, whether those regulations supersede the laws of the States in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579:

(P. 405) "If any one proposition could command the universal assent of mankind, we might expect it would be this,—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this Constitution, and the laws of the United States which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the

state legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.' * * * *

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

True, prior to the present act, the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, has not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. * * * * And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is.

We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of the superior courts of the State of Connecticut, and, in that case, the Supreme Court of Errors of the State answered the question in the negative. * * * *

We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional act, "That the Circuit Courts of the United States shall have original cognizance, *concurrent with the courts of the several States*, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, *and arising under the Constitution or laws of the United States*." * * * * This is emphasized by the amendment engrafted upon the original act in 1910, to the effect that "the jurisdiction of the courts of the United States under this act shall be *concurrent with that of the courts of the several States*, and no case arising under this act, and brought in any State court of competent jurisdiction, shall be removed to any court of the United States." The amendment, as appears by its language,

instead of granting jurisdiction to the state courts, presupposes that they already possessed it.

The suggestion that the Act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. * * * *

We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

(The court reversed the Mondou case, and sustained the judgments in the other three so as to uphold the act.)

Note.—See *Champion vs. Ames*, page 91, for another example of Federal police power, as affecting interstate commerce.

8. The Patent and Copyright Clause as Affecting Commerce and Price Fixing.

The Constitution in Article I, Section 9, provides that "Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

SIDNEY HENRY, ET AL., *v.* A. B. DICK COMPANY.

224 U. S. 1. March 11, 1912.

The complainant, the A. B. Dick Company, brought an action for the infringement of two letters patent, owned by it, covering a

stencil-duplicating machine known as the "Rotary Mimeograph." The Dick Company sold to Miss Christina B. Skou, of New York, a Rotary Mimeograph embodying the invention described and claimed in said patents, under a license which was attached to said machine, as follows:

"LICENSE RESTRICTION.—This machine is sold by the A. B. Dick Company with the license restriction that it may be used only with the stencil paper, ink, and other supplies made by A. B. Dick Company, Chicago, U. S. A."

The defendant, Sidney Henry, sold to Miss Skou a can of ink suitable for use on said mimeograph, with knowledge of the said license agreement, and with the expectation that it would be used in connection with said mimeograph. The ink sold to Miss Skou was not covered by the claims of said patents. Upon the facts above set forth the U. S. Circuit Court of Appeals for the Second District desired the instruction of the Supreme Court and certified to the Supreme Court the following question: "Did the acts of the defendants constitute contributory infringement* of the complainant's patents?"

MR. JUSTICE LURTON delivered the opinion of the court.

* * * * That the license agreement constitutes a contract not to use the machine in a prohibited manner is plain. That defendants might be sued upon the broken contract, or for its enforcement, or for the forfeiture of the license, is likewise plain. But if, by use of the machine in a prohibited way, Miss Skou infringed the patent, then she is also liable to an action under the patent law for infringement. * * * *

The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be unconditional. But if the right of use be confined by specific restriction, the use not permitted is necessarily reserved to the patentee. If that reserved control of use of the machine be violated, the patent is thereby invaded. This right to sever ownership and use is deducible from the nature of a patent monopoly and is recognized in the cases. * * * *

(The court takes up the monopolistic character of the patent and in connection with the right to exclusive use states:)

In the Paper Bag case, 210 U. S. 405, this right to exclude others from all use of the invention was held to be so comprehensive that a patentee was allowed to restrain, by injunction, one who was

Note.—Contributory infringement has been well defined as the intentional aiding of one person by another in the unlawful making, or selling, or using of the patented invention. *Thompson-Houston Electric Co. v. Kelsey, etc.*, Co., 72 Fed. 1016.

infringing his patent, although he had, during a long term of years, neither used his invention himself, nor allowed others to use it.

But it has been very earnestly said that a condition restricting the buyer to use it only in connection with ink made by the patentee is one of a character which gives to a patentee the power to extend his monopoly so as to cause it to embrace any subject, not within the patent, which he chooses to require that the invention shall be used in connection with. Of course, the argument does not mean that the effect of such a condition is to cause things to become patented which were not so without the requirement. The stencil, the paper, and ink made by the patentee, will continue to be unpatented. Any one will be as free to make, sell, and use like articles as they would be without this restriction, save in one particular,—namely, they may not be sold to a user of one of the patentee's machines with intent that they shall be used in violation of the license. To that extent competition in the sale of such articles for use with the machine will be affected; for sale to such users for infringing purposes will constitute contributory infringement. But the same consequence results from the sale of any article to one who proposes to associate it with other articles to infringe a patent, when such purpose is known to the seller. But could it be said that the doctrine of contributory infringement operates to extend the monopoly of the patent over subjects not within it because one subjects himself to the penalties of the law when he sells unpatented things for an infringing use? If a patentee says, "I may suppress my patent if I will. I may make and have made devices under my patent, but I will neither sell nor permit any one to use the patented things," he is within his right, and none can complain. But if he says, "I will sell with the right to use only with other things proper for using with the machines, and I will sell at the actual cost of the machines to me, provided you will agree to use only such articles as are made by me in connection therewith,"—if he chooses to take his profit in this way, instead of taking it by a higher price for the machines, has he exceeded his exclusive right to make, sell, and use his patented machines? The market for the sale of such articles to the users of his machine, which, by such a condition, he takes to himself, was a market which he alone created by the making and selling of a new invention. Had he kept his invention to himself, no ink could have been sold by others for use upon machines embodying that invention. By selling it subject to the restriction, he took nothing from others and in no wise restricted their legitimate market.

For the purpose of testing the consequence of a ruling which will support the lawfulness of a sale of a patented machine for use only its connection with supplies necessary for its operation, bought from the patentee, many fanciful suggestions of conditions which might be imposed by a patentee have been pressed upon us. Thus it is said that a patentee of a coffee pot might sell on condition that it be used only with coffee bought from him, or, if the article be a

circular saw, that it might be sold on condition that it be used only in sawing logs procured from him. These and other illustrations are used to indicate that this method of marketing a patented article may be carried to such an extent as to inconvenience the public and involve innocent people in unwitting infringements. But these illustrations all fail of their purpose, because the public is always free to take or refuse the patented article on the terms imposed. If they be too onerous or not in keeping with the benefits, the patented article will not find a market. The public, by permitting the invention to go unused, loses nothing which it had before, and when the patent expires will be free to use the invention without compensation or restriction. This was pointed out in the *Paper Bag Case*, where the inventor would neither use himself nor allow others to use, and yet was held entitled to restrain infringement, because he had the exclusive right to keep all others from using during the life of the patent. This larger right embraces the lesser of permitting others to use upon such terms as the patentee chooses to prescribe. It must not be forgotten that we are dealing with a constitutional and statutory monopoly. An attack upon the rights under a patent because it secures a monopoly to make, to sell, and to use, is an attack upon the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use. And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries requires to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands it contains none, and the duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial. The decisions of this court, as we have construed them, do not so limit the privilege of the patentee, and we could not so restrict a patent grant without overruling the long line of judicial decisions from circuit courts and circuit courts of appeal, heretofore cited, thus inflicting disastrous results upon individuals who have made large investments in reliance upon them.

The conclusion we reach is that there is no difference, in principle, between a sale subject to specific restrictions as to the time, place, or purpose of use, and restrictions requiring a use only with other things necessary to the use of the patented article purchased from the patentee. If the violation of the one kind is an infringement, the other is also. * * * *

So understanding the import of the question in connection with the facts certified, we must answer the question certified affirmatively.

MR. CHIEF JUSTICE WHITE, with whom concurred MR. JUSTICE HUGHES and MR. JUSTICE LAMAR, dissenting:

* * * * I do not think it necessary to stop to point out the innumerable subjects which will be susceptible of being removed from the operation of State judicial power, and the fundamental and radical character of the change which must come as a result of the principle decided. But nevertheless let me give a few illustrations:

Take a patentee selling a patented engine. He will now have the right, by contract to bring under the patent laws all contracts for coal or electrical energy used to afford power to work the machine, or even the lubricants employed in its operation. Take a patented carpenter's plane. The power now exists in the patentee by contract to validly confine a carpenter purchasing one of the planes to the use of lumber sawed from trees grown on the land of a particular person, or sawed by a particular mill. Take a patented cooking utensil. The power is now recognized in the patentee to bind by contract one who buys the utensil to use in connection with it no other food supply but that sold or made by the patentee. Take the invention of a patented window frame. It is now the law that the seller of the frame may stipulate that no other material shall be used in a house in which the window frames are placed except such as may be bought from the patentee and seller of the frame. Take an illustration which goes home to everyone,—a patented sewing machine. It is now established that, by putting on the machine, in addition to the notice of patent required by law, a notice called a license restriction, the right is acquired, as against the whole world, to control the purchase by users of the machine of thread, needles, and oil lubricants or other materials convenient or necessary for operation of the machine. The illustrations might be multiplied indefinitely. That they are not imaginary is now a matter of common knowledge, for, as the result of a case decided some years ago by one of the circuit courts of appeal, which has been followed by cases in other circuit courts of appeal, to which reference will hereafter be made, what prior to the first of those decisions on a sale of a patented article was designated a condition of sale, governed by the general principles of law, has come in practice to be denominated a license restriction; thus, by the change of form, under the doctrine announced in the cases referred to, bring the matters covered by the restriction within the exclusive sway of the patent law. As the transformation has come about in practice since the decisions in question, the conclusion is that it is attributable as an effect caused by the doctrine of those cases. And, as I have previously stated, it is a matter of common knowledge that the change has been frequently resorted to for the purpose of bringing numerous articles of common use within the monopoly of a patent when otherwise they would not have been embraced therein, thereby tending to subject the whole of society to a widespread and irksome monopolistic control.

FIXING PRICES ON PATENTED ARTICLES.
STANDARD SANITARY MFG. CO. *v.* UNITED STATES.
THE BATH TUB TRUST CASE.

226 U. S. 20. November 18, 1912.

Sixteen corporations embracing 85 per cent. of the manufacturers and 90 per cent. of the jobbers in enameled ironware, such as bath-tubs, sinks, etc., made in the United States, entered into a mutual agreement by which they bound themselves to sell certain grades of the ware only at the prices and on the terms fixed in the schedules attached to the agreement, or by a committee appointed by the parties thereto, and only to jobbers who should sign the resale contract prepared by them, the conditions of which were that they would not resell to plumbers except at the prices determined by the manufacturers and that they would not deal in the products of manufacturers not in the combination. The contracts or agreements creating the combination were embodied in written licenses to its members (the defendants) to use a patented automatic dredger, which was a useful and time-saving tool used in finishing the ware to sprinkle the last two or more coats of powdered enamel on the heated iron, the ware itself being unpatented, and the enameling being but one of the several operations required in its production, to which operation even the patented dredger was not an essential, but merely an improvement on the hand-operated dredges of the prior art still in use in some factories. The government brought a civil suit for a violation of the Sherman Anti-Trust Act against the corporations in this combination and joined as a party defendant, Edwin L. Wayman, the licensor of the right to use the automatic dredger, as it was in his license agreements with the various companies that the provisions for price fixing, etc., appeared. The defendants contended that a patentee could make such agreements as these under the patent laws without violating the Sherman Act. The lower court entered a decree in favor of the government, whereupon an appeal was taken to the Supreme Court.

MR. JUSTICE MCKENNA delivered the opinion of the court:

Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others, not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions, but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was

established by the co-operation of 85 per cent. of the manufacturers, and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument, "cash bail." The royalty for each furnace was \$5, 80 per cent. of which was to be returned if the agreement was faithfully observed; it was to be "forfeited as a penalty" if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90 per cent. of the jobbers in number and more than 90 per cent. in purchasing power joined the combination.

The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. * * * And there is nothing in *Henry v. A. B. Dick Co.*, 224 U. S. 1, which contravenes the views herein expressed. * * * *

Decree affirmed.

Note.—Subsequent to the above decision, to wit, February 14, 1913, eleven corporations and eleven individuals in the bathtub trust were found guilty of criminal conspiracy in restraint of trade by a jury in the United States District Court. They were indicted under the criminal section of the Sherman Anti-Trust Act.

BAUER & CIE. AND THE BAUER CHEMICAL COMPANY v. JAMES O'DONNELL.

THE SANATOGEN CASE.

229 U. S. 1. May 26, 1913.

MR. JUSTICE DAY delivered the opinion of the court:

This case is on a certificate from the Court of Appeals of the District of Columbia. The facts stated in the certificate are:

Bauer & Cie., of Berlin, Germany, co-partners, being the assignees of letters patent of the United States, dated April 5, 1898, No. 601995, covering a certain water soluble albumenoid known as "Sanatogen" and the process of manufacturing the same, about July, 1907, entered into an agreement with F. W. Hehmeyer, doing business in the city of New York under the trade name of the Bauer Chemical Company, whereby Hehmeyer became and has since been the sole agent and licensee for the sale of said product in the United States, the agreement contemplating that Hehmeyer should have power to fix the price of sale to wholesalers or distributors and to retailers, and to the public. The agreement further contemplated that said product should be furnished Hehmeyer at manufacturing cost, the net profits obtained by him to be shared equally by the parties to the agreement. Since April, 1910, this product

has been uniformly sold and supplied to the trade and to the public by the appellants and their licensees in sealed packages bearing the name "Sanatogen," the words "Patented in U. S. A., No. 601995," and the following:

"Notice to the retailer.

"This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar (\$1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent No. 601,995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

"A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation.

"THE BAUER CHEMICAL CO."

The appellee is the proprietor of a retail drug store at 904 F street N. W., in this city. He purchased of the Bauer Chemical Company for his retail trade original packages of said Sanatogen bearing the aforesaid notice. These packages he sold at retail at less than one dollar and, persisting in such sales, appellants in March, 1911, severed relations with him. Thereupon appellee, without the license or consent of the appellants, purchased from the jobbers within the District of Columbia, said jobbers having purchased from appellants, original packages of said product bearing the aforesaid notice, sold said packages at retail at less than the price fixed in said notice, and avers that he will continue such sales.

The question propounded is:

Did the acts of the appellee, in retailing at less than the price fixed in said notice, original packages of "Sanatogen" purchased of jobbers as aforesaid, constitute infringement of appellants' patent? * * * *

It is contended in argument that the notice in this case deals with the use of the invention, because the notice states that the package is licensed "for sale and use at a price not less than one dollar"; that a purchase is an acceptance of the conditions; and that all rights revert to the patentee in event of violation of the restriction. But, in view of the facts certified in this case, as to what took place concerning the article in question, it is a perversion of terms to call the transaction in any sense a license to use the invention. The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales, no right to any royalty thereon, or to participation in the profits thereof. The packages were sold with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than \$1. In other words, the title transferred was full and complete, with an attempt to reserve the right to fix the price at which subsequent sales could be made. There is no showing of a qualified sale for less than value for limited use with other articles only, as

was shown in the Dick case. There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words.

The real question is whether in the exclusive right secured by statute to "vend" a patented article there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made. The patentee relies solely upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The appellee and the jobbers from whom he purchased were neither the agents nor the licensees of the patentee. They had the title to, and the right to sell, the article purchased without accounting for the proceeds to the patentee and without making any further payment than had already been made in the purchase from the agent of the patentee. Upon such facts as are now presented we think the right to *vend* secured in the patent statute is not distinguishable from the right of *vending* given in the copyright act. In both instances it was the intention of Congress to secure an exclusive right to sell, and there is no grant of a privilege to keep up prices and prevent competition by notices restricting the price at which the article may be resold. The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act. This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act.

Holding these views, the question propounded by the Court of Appeals will be answered in the negative, and it is so ordered.

Dissenting: Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Lurton, and Mr. Justice Van Devanter.

ISIDOR STRAUS AND NATHAN STRAUS, TRADING AS
R. H. MACY & CO., *v.* AMERICAN PUBLISHERS'
ASSOCIATION, ET AL.

231 U. S. 222. Decided December 1, 1913.

Isidor Straus and Nathan Straus, trading as R. H. Macy & Co., brought suit in the Supreme Court of New York State asking for an injunction against the American Publishers' Association and the American Booksellers' Association, restraining them from interfering with plaintiffs' right to purchase and sell copyrighted books. The plaintiffs alleged that they conducted a department store in New York City, a large department of which was devoted to books, magazines, pamphlets; that because of their methods of business they had been able to undersell other retail book stores. The American Publishers' Association by means of resolutions and agreements, and with the co-operation of the association and their

members, and by the use of various practices and methods, had stipulated that books should be sold to booksellers only, who would maintain the retail prices upon copyrighted books for one year, and the members of the association would not sell books to anyone who would cut such prices. The plaintiffs maintained that the defendants had thereby restrained and prevented competition in the State of New York and throughout all of the United States in the supply and prices of books, and that the same was in violation of the Sherman Anti-Trust Law, and that thereby also their business had been seriously affected, and they asked that the combinations and agreements among the members of the association and with the association be declared unlawful, and that the defendants be enjoined from acting thereunder or accomplishing the purposes of such agreement. The case was tried before court without a jury, and the court found that the facts set forth by the plaintiffs were true. The association then amended their resolutions and agreements so as to restrict the same to copyrighted books only, and to the end that they would not apply to uncopyrighted books. The State court decided that so far as such resolutions and agreements related to uncopyrighted books they were unlawful and granted an injunction and damages, but held that as to copyrighted books the agreements, resolutions and actions of the defendants were not unlawful. On appeal, the Court of Appeals of New York State held that the agreement as to copyrighted books was not illegal because of the monopoly granted to a holder of a copyright under the statute of the United States. From this decision an appeal was taken to the Supreme Court of the United States.

MR. JUSTICE DAY delivered the opinion of the court:

From the finding of facts upon which the court certified the question decided to the Court of Appeals, after the attempted reformation in view of the first decision of that court, it appears that the Publishers' Association was composed of probably 75 per cent. of the publishers of copyrighted and uncopyrighted books in the United States, and that the Booksellers' Association included a majority of the booksellers throughout the United States; that the associations adopted resolutions and made agreements obligating their members to sell copyrighted books only to those who would maintain the retail price of such net copyrighted books, and, to that end, that the associations combined and co-operated with the effect that competition in such books at retail was almost completely destroyed. The findings further show that the associations employed various methods of ascertaining whether prices of net copyrighted books were cut and whether there was competition in the sale thereof at retail, and issued cut-off lists, so-called, directing the discontinuance of the sale of such books to offenders, and that the plaintiffs in error, who had failed to maintain net prices upon copyrighted books, had been put upon the cut-off lists, and were unable to secure a supply of such books in the ordinary course of business. It further appears that in some instances dealers who had supplied the plaintiffs in error were wholly ruined and driven out of busi-

ness; that the Booksellers' Association widely circulated the names of such dealers, and warned others to avoid their fate, and that various circulars were issued to the trade at large by both associations, warning all persons against dealing with the plaintiffs in error or other so-called price-cutters; that after the reformation of the resolutions and agreements of 1904, the associations and their members continued the same methods as to ascertaining the supply of copyrighted books of the plaintiffs in error, as to cut-off lists and circulars to the trade, and that, although in 1907 the resolution of the Publishers' Association was modified so that the "agreement" became a "recommendation," the cut-off lists were still issued, with plaintiff's name thereon, and that the dealers still refused to supply plaintiffs in error with books of any kind. And it also appears from the findings of fact that the members of the associations resided in and carried on the business of selling books in many different States, and purchased books from persons in many States other than the one in which they resided and did business; and that the rules, regulations and agreements of the associations were enforced against all publishers and dealers in books throughout the United States, whether they were members of either association or not, and whether they purchased books in one State for transportation and delivery in another or for delivery in the State where purchased. We agree with the Court of Appeals in its characterization of the agreement involved in this case, about which there seems to have been no difference of opinion, except as to the supposed protection of the copyright act. It manifestly went beyond any fair and legal agreement to protect prices and trade as among parties thereto, and prevented, as the Court of Appeals said, when dealing with uncopyrighted books, the sale of books of any kind, at any price, to those who were condemned by the terms of the agreement, and with whom dealings were practically prohibited. We conclude, therefore, that the Court of Appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman Act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the State Act as to copyrighted books.

As the Federal question, made in the manner which we have stated, was, in our view, wrongly decided, and such decision was the basis of the judgment in the State court, the judgment of that court must be reversed. *Murdock v. Memphis*, 20 Wall. 590.

Judgment reversed and case remanded to the State court whence it came for further proceedings not inconsistent with this opinion.

Note 1.—In *Dr. Miles Medical Co. v. Park*, 220 U. S. 373 (1911), the medical company was engaged in the manufacture and sale of proprietary medicines, prepared by means of secret methods and formulas, and identified by distinctive packages, labels and trademarks. It had established an extensive trade throughout the United States and foreign countries, selling its products to jobbers and wholesale druggists, who in turn sold to retail druggists. In the case of each remedy it fixed, by written contract, not only the price of

its own sales to jobbers and wholesale dealers, but also the retail prices, selling its products to those only who agreed to observe such price regulations. The company alleged that certain department stores had inaugurated a "cut rate" or "cut price" system which caused great damage to its business and affected the sale of the remedies, from the fact that the retail drug stores could not meet such cut rate prices, and therefore no longer kept the remedies in stock for sale. The defendant, Park, having procured supplies of the remedies from third parties, "advertised, marketed and sold" the same at cut rates. The company asked for an injunction against such practices and other necessary relief. The Supreme Court held that such contracts fixing the price restricted competition and were in restraint of trade. They resulted in a combination between the manufacturer, wholesalers and retailers to maintain prices and stifle competition. The Court said: "Agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. * * * * The complainant's plan falls within the principle which condemns contracts of this class. * * * * And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its products at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." The injunction asked for was refused.

The following cases on "price fixing contracts or combinations" have been decided recently in the lower Federal Courts. In some cases appeals to the Supreme Court have been taken:

Note 2.—In the Ford Case (*Ford Motor Company v. Union Motor Sales Company*, U. S. Dist. Ct., Ohio), it was held that since the vendor (the Ford Company) had actually parted with the title to the cars sold to its licensed dealers it could not, by contract with its dealers, dictate the resale price. The court cites the case of *Bauer v. O'Donnell*, in which it was held that the vendor of a patented article could not by the notice on the package control the price at which the article should be resold after purchase by the vendee. It holds that what cannot be done by notice to the vendee cannot be done by contract with the vendee, as in both cases the sale to the vendee passes the article out of the patent monopoly and beyond the control of the patentee. This case involved an old form of contract which the Ford Company has discontinued. Its new form of contract was passed upon in a decision given in the District Court of the United States, in Illinois, by Judge Landis, December 3, 1914, by which the Barry Sales Company was enjoined from "inducing or attempting to induce any authorized agent of the Ford Company to arrange for the sale of Ford cars in violation of any of the terms of the contract of such agent with the company."

Note 3.—Keystone Watch Case: The growth of the Keystone Watch Company and the various consolidations by which it had been formed and enlarged were not criticized by the court, but the attempt of the company later on to coerce its jobbers to sell at a fixed price, by threatening refusal to deal with those who would not, was held to be a direct and unlawful restraint of trade. The plan of selling the Howard watch, material parts of

which were protected by patents, was held lawful so far as fixing by agreement with the jobbers a minimum fixed price at which the jobber should sell, but unlawful in the further attempt by notice on the box containing the watch to control the price at which the retailer should sell to the consumer. This case was decided by Buffington, Hunt and McPherson, Circuit Judges in the Circuit Court of Appeals in Pennsylvania.

Note 4.—In the Victor Talking Machine Case (Victor Talking Machine Co. v. Macy & Co., U. S. Dist. Ct., N. Y.), the Victor Company brought suit for the infringement of its patents. Various patents cover the Victor Talking Machine and sound records. Every machine and sound record has accompanying it a notice that the title remains in the manufacturer for the term of the patent having the longest term to run. The license to use the machine and records is granted on payment of a fixed sum as royalty at the time the license is granted. Upon the final expiration of the patents the goods become the property of the licensee if he shall have observed the conditions of the license. The contract also provides for retaking the patented goods upon violation of any of the terms of the license. One of those terms is that the goods shall be relicensed only upon payment of certain fixed prices. Alleged infringement lay in the act of the defendant selling the articles outright for less than the fixed price. The court held that the complainant by receiving the entire royalty had parted with its interest and could not object to a licensee disposing of the article at less than the fixed price. The court said in conclusion: "If this were a case of first impression I might feel that no sufficient reason exists for holding that a patentee could not attach such limitations to the future use of his patented goods as he might choose irrespective of whether he had received a full royalty or not. I think, however, the case of *Bauer v. O'Donnell* holds to the contrary."

Note 5.—*Kellogg Case* (U. S. v. Kellogg Toasted Corn Flake Co., U. S. Dist. Ct. in Michigan) No illegality was alleged in the formation or growth of the company, but the Government centered its attack on the present selling plan of the defendant, which it claimed was a combination between the company and its jobbers and retailers. The selling plan is briefly described as follows: The company owns a patent on the cartons or packages in which its "Corn Flakes" are sold. Sales are made directly to jobbers, the company refusing to deal with consumers or retailers. Agreements are exacted from the jobbers to charge the retailers a specified price, and this condition is strictly enforced by the company refusing to continue dealings with any jobber who fails to maintain the fixed prices. An attempt is made to form agreements between the company and the retailer by printing on the carton that the package and its contents are sold on condition that the package and contents shall not be retailed for less than ten cents, and that a violation would be considered as an infringement on the company's patent rights. The Court held that although the notice on the carton may not constitute a valid contract it may still have the effect of unduly restraining trade, and the fact that the carton is patented is immaterial in determining whether the company's plan of maintaining prices was a violation of the Sherman Law.

Also in *Kellogg Co. v. Buck*, 208 Federal Reports 383, in refusing to enforce the restrictions above mentioned the court held that where a patented article has passed into the channels of trade and reached a retail dealer, the manufacturing patentee is not entitled to enforce a price restriction agreement.

Sub-Section B.

EXTENT OF THE POWER OF THE STATES OVER COMMERCE.**1. The State Taxing Power as Affecting Commerce.**BROWN *v.* MARYLAND.

12 WHEATON, 419. 1827.

A statute of Maryland, passed in 1821, provided that all importers of foreign commodities or articles and persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce should, before being authorized to sell the same take out a license, for which they should pay fifty dollars. In case of neglect or refusal to pay the license, a heavy penalty was imposed by the statute. Brown was charged with having imported and sold one package of foreign dry goods without having a license to do so. He was fined by the State Court and the Court of Appeals upheld the lower court. An appeal was taken to the Supreme Court of the United States on the ground that the Legislature of a State could not constitutionally require the importer of foreign articles to take out a license from the State before being permitted to sell a bale or package so imported.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court :

The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the Constitution of the United States.

1. To that which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

* * * *

What, then, is the meaning of the words, "imposts or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over

them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition. * * * *

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of an encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power

to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No objection of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by imposts, so far as it is drawn from importations into the particular State.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own.' The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the State, by breaking up his packages and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

We think, then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the Constitution which declares, that "no State shall lay any impost or duties on imports or exports."

Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several States, and with Indian tribes"?

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evil proceeding from the feebleness of the Federal government contributed more to the great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior. * * * *

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as

essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the Act of Congress which authorizes importation. Any change on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation. * * * *

We think there is error in the judgment of the Court of Appeals of the State of Maryland imposing the penalty.

Judgment is reversed.

Note.—In *Almy v. California*, 24 Howard, 169, 1860, an act passed by California to provide revenue from a stamp tax on certain instruments of writing, including bills of lading for the transportation of gold, was held to be equivalent to a duty upon the exportation of gold, and hence repugnant to the Constitution of the United States, which in express terms declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

ROBBINS *v.* SHELBY COUNTY TAXING DISTRICT.

120 U. S., 489. 1886.

Sabine Robbins, the defendant in the lower court, was engaged in soliciting sales of goods in the city of Memphis, Tennessee, for the firm of Rose, Robbins & Co., of Cincinnati, Ohio. In obtaining orders for certain paper goods and stationery which he was selling, he exhibited samples of the same—an employment usually denominated as that of a "drummer." A statute of Tennessee, relating to taxation, provided "that drummers, and all persons not having a regular licensed house of business in the taxing district offering for sale or selling goods, wares or merchandise by sample shall be required to pay to the county trustee the sum of \$10 per week, or

\$25 per month for such privilege, and no license shall be issued for a longer period than three months." The statute further provided for a fine and imprisonment in case of the violation of the act. Under this law Robbins, who had not paid the tax, was convicted and sentenced to pay a fine. The Supreme Court of the State of Tennessee held that the statute was constitutional and affirmed the judgment of the lower court. An appeal was then taken to the United States Supreme Court on the ground that the statute was repugnant to the clause of the Constitution giving to Congress the power to regulate commerce among the several States.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The principal question argued before the Supreme Court of Tennessee was as to the constitutionality of the act which imposed the tax on drummers; and the court decided that it was constitutional and valid.

That is the question before us, and it is one of great importance to the people of the United States, both as it respects their business interests and their constitutional rights. It is presented in a nutshell, and does not, at this day, require for its solution any great elaboration of argument or review of authorities. * * *

In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State, to sell his goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them, at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a staple and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to

sell them. But this would require a warehouse or a store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States? Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things.

It may be suggested that the merchant or manufacturer has the post-office at his command, and may solicit orders through the mails. We do not suppose, however, that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the State. Besides, why could not the State to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way?

The truth is, that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans or Jacksonville, for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. This right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts. * * * *

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers

—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone.

It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other States. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other States in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it.

The judgment of the Supreme Court of Tennessee is reversed, and the plaintiff in error discharged.

Note 1.—In *Browning v. City of Waycross*, 233 U. S. 16 (April 6th, 1914), one E. A. Browning was convicted of violating an ordinance of the city of Waycross, Georgia, which imposed an annual occupation tax of \$25 upon "Lightning rod agents or dealers engaged in putting up lightning rods" within the city. Browning, who represented a Missouri corporation, soliciting orders and erecting the rods without extra charge to the purchasers upon receiving the same from St. Louis, Missouri, contended that he was carrying on interstate commerce, which the city could not thus tax without violating the Constitution. The Supreme Court of the United States affirmed the con-

viction, deciding that the matter was within the regulating power of the State and not the subject of interstate commerce, for the following reasons: "(a) Because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of State authority. (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business, protected by the commerce clause."

Note 2.—In *Caldwell v. North Carolina*, 187 U. S. 622, there was at issue the validity of an ordinance of the village of Greensboro, North Carolina, which imposed a tax upon the business of selling or delivering picture frames and photographs. The question was whether Caldwell, the agent of an Illinois corporation, was liable for this tax, because in Greensboro he had taken from a railroad freight office certain packages of frames and pictures which were awaiting delivery, and which had been shipped to Greensboro by the selling corporation to its own order, for the purpose of filling orders previously obtained by its agents in North Carolina. After the frames and pictures, which had been shipped in separate packages from Chicago, were received by Caldwell, they were fitted together in a room in a hotel, and were delivered to those who had ordered them. It was contended that the act of Caldwell in receiving the pictures and frames and bringing them together was not under the protection of the commerce clause, but was the transaction of local business after the termination of interstate commerce. It was adjudged that as both the pictures and frames had been ordered from another State, and their shipment was the fulfillment of an interstate commerce transaction, the mere fact that they were shipped in separate packages and brought together at the termination of the transit did not amount to the transaction of business within North Carolina which the State could tax without placing a direct burden upon interstate commerce.

Note 3.—In *Singer Sewing Machine Company v. Birchell*, 233 U. S. 304, (April 6th, 1914), the State of Alabama, under the Act of March 31st, 1911, taxed every person, firm or corporation selling or delivering sewing machines \$50 annually for each county in which the said articles were sold, and \$25 annually in each county for every wagon and team used in delivering or displaying such machines. The act exempted from the tax "merchants selling the said articles at their regularly established places of business." The Singer Sewing Machine Company, a New Jersey corporation, sold and rented machines in Alabama, in part from regularly established places of business and in part from delivery wagons going from place to place in the respective counties. The company contended that the act was a burden upon interstate commerce, and discriminated against itinerant sellers of machines. The Supreme Court of the United States held the statute was valid, saying: "The statute under consideration does not in direct terms or by necessary

inference manifest an intent to regulate or burden interstate commerce. * * * * The statute provides for a license or occupation tax. Normally, as the averments of the bill sufficiently show, the occupation may be and is conducted wholly intrastate, and free from any element of interstate commerce. * * * * In each county there is a store or regular place of business, from which all of the local agents for the same county are supplied with sewing machines and appurtenances that are to be taken into the rural districts for the sale or renting, and all transactions that enter into the sale or renting are completely carried out within a single county." The court decided, also, there was no unlawful discrimination, and said: "The State has a wide range of discretion with respect to establishing classes for the purpose of imposing revenue taxes, and its laws upon the subject are not to be set aside as discriminatory unless it clearly appears that there is no rational basis for the classification."

Note 4.—In *Steward v. State of Michigan*, 232 U. S. 665 (decided March 23rd, 1914), the Supreme Court decided that a State may not, consistently with the commerce clause of the Constitution, impose a license tax upon a non-resident merchant traveling from place to place within the State, and soliciting orders, by sample, lists and catalogues, for goods which are afterwards shipped into the State in carload lots to his order, and which he delivers from the cars to the persons ordering them.

STATE TONNAGE TAX CASES.

12 WALLACE, 204. 1870.

The State of Alabama passed a statute on February 22, 1866, imposing a tax "on all steamboats, vessels, and other water crafts plying in the navigable waters of the State. * * * * at the rate of \$1 per ton of the registered tonnage thereof." The question in these cases was whether this statute conflicted with the clause of the Constitution of the United States ordaining that "no State shall without the consent of Congress lay any duty of tonnage."

MR. JUSTICE CLIFFORD delivered the judgment of the court.

The word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of 100 cubical feet each.

Taxes levied by a State upon ships and vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying any duty of tonnage, without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or the citizens of an-

other State, as the prohibition is general. * * * * The court is of the opinion that the State law levying the taxes in this case is unconstitutional and void.

THOMPSON *v.* UNION PACIFIC RAILROAD COMPANY.

9 WALLACE, 579. 1869.

The stockholders of the Union Pacific Railroad Company, which was incorporated by the territory of Kansas, brought suit in the United States Circuit Court for the District of Kansas to restrain the officers of the company from paying a tax levied by the State of Kansas on the property of the company in that State. The stockholders contended that as the company enjoyed certain franchises granted by Congress, in return for which they were to carry United States mail and transport troops in time of war, etc., the State was in reality taxing a Federal agency and hence the tax was unconstitutional as applied to the Union Pacific Railroad Company. The judges of the Circuit Court were divided in their opinion, so the case was certified to the Supreme Court of the United States.

MR. CHIEF JUSTICE CHASE delivered the opinion of the court.

The main argument for the complainants, however, is that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under State authority. It is to be observed that this exemption is not claimed under any act of Congress. It is not asserted that any act declaring such exemption has ever received the sanction of the National legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the General Government. It is urged that the aids granted by Congress to the road were granted in the exercise of its constitutional powers to regulate commerce, to establish post-offices and post-roads, to raise and support armies, and to suppress insurrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of the government, and as such was not subject to taxation by the State.

The case of *McCulloch v. Maryland* is much relied on in support of this position. But we apprehend that the reasoning of the court in that case will hardly warrant the conclusion which counsel deduce from it in this. In that case the main questions were, Whether the incorporation of the Bank of the United States, with power to establish branches, was an act of legislation within the constitutional power of Congress, and, whether the bank and its branches, as actually established, were exempt from taxation by State legislation. Both questions were resolved in the affirmative. * * * *

It is unquestionably true that the court, in determining the second general question, already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation by the State of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers, and functions. It did not owe its existence, or any of its qualities, to State legislation. And its exemption from taxation was put upon this ground. Nor was the exemption itself without important limitations. It was declared not to extend to the real property of the bank within the State; nor to interests held by citizens of the State in the institution.

In like manner other means and operations of the government have been held to be exempt from State taxation: as bonds issued for money borrowed, *Weston v. City of Charleston*, 2 Pet. 467; certificates of indebtedness issued for money or supplies, *The Banks v. The Mayor*, 7 Wall. 24; bills of credit issued for circulation, *Bank v. Supervisors*, *Ib.* 28. There are other instances in which exemption, to the extent it is established in *McCulloch v. Maryland*, might have been held to arise from the simple creation and organization of corporations under acts of Congress, as in the case of the National Banking Associations; but in which Congress thought fit to prescribe the extent to which State taxation may be applied. *Van Allen v. The Assessors*, 3 Id. 573; *Bradley v. The People*, 4 Id. 459; *People v. Commissioners*, *Ib.* 244. In all these cases, as in the case of the Bank of the United States, exemption from liability to taxation was maintained upon the same ground. The State tax held to be repugnant to the Constitution was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government, is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the government, created by itself for public and constitutional ends. But we are not aware of any case in which the real estate, or other property of a corporation not organized under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.

* * * *

We do not doubt the propriety or the necessity, under the Constitution, of maintaining the supremacy of the General Government within its constitutional sphere. We fully recognize the soundness of the doctrine, that no State has a "right to tax the means employed by the government of the Union for the execution of its powers." But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means;

taxation of the property of the agent is not always, or generally, taxation of the means.

No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection. *Lane County v. Oregon*, 7 Wall. 77. * * * *

The nature of the claims to exemption which would be set up, is well illustrated by that which is advanced in behalf of the complainants in the case before us. The very ground of claim is in the bounties of the General Government. The allegation is, that the government has advanced large sums to aid in construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself except that the company will perform certain services for full compensation, independently of those grants; and will admit the government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants, and this fully compensated employment, it is claimed that this State corporation, owing its being to State law, and indebted for these benefits to the consent and active interposition of the State legislature, has a constitutional right to hold its property exempt from State taxation, and this without any legislation on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government.

We are unable to find in the Constitution any warrant for the exemption from State taxation claimed in behalf of the complainants; and must, therefore, answer the question certified to us

In the affirmative.

UNION PACIFIC RAILROAD COMPANY *v.* PENISTON.

18 WALLACE, 5. 1873.

The State of Nebraska taxed the property of the Union Pacific Railroad Company in that State and the same question was raised as in *Thompson v. Union Pacific Railroad Company*. There was one point of difference, however, which the opinion of the Court brings out clearly.

MR. JUSTICE STRONG delivered the opinion of the court.

It is, however, insisted that the case of *Thompson v. The Union*

Pacific Railroad Company differs from the case we have now in hand in the fact that it was incorporated by the Territorial legislature and the legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. * * * *

It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

CALIFORNIA *v.* CENTRAL PACIFIC RAILROAD COMPANY.

127 U. S. 1. 1887.

The State of California laid a tax upon certain property of transportation companies, including franchises conferred by the United States. The State brought suit to collect the tax in its own courts, but the railroads removed the suits to the United States Circuit Court. The Central Pacific and other railroad companies resisted the tax on the ground that the State could not constitutionally levy such a tax. The Circuit Court gave judgment for the railroad, whereupon an appeal was taken to the Supreme Court of the United States.

MR. JUSTICE BRADLEY delivered the opinion of the court.

* * * * Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law Blackstone defines it as "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject." 2 Bl. Com. 37. Generalized, and divested of the special form which

it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland*, "the power to tax involves the power to destroy." * * * *

The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases.

Judgment affirmed.

MAINE *v.* GRAND TRUNK RAILWAY COMPANY.

142 U. S., 217. 1891.

The State of Maine in 1881 passed a statute providing that every corporation operating a railroad in the State was to pay an annual franchise tax for the privilege of exercising its franchises in the State. The amount of the tax to be paid was to be determined by

the amount of the corporation's gross transportation receipts. The act further provided that when applied to a railroad lying partly within and partly without the State, the tax should be assessed upon that proportion of the gross receipts which the number of miles of the railroad in the State bore to the whole number of miles of railroad operated by the corporation. The lines of the Grand Trunk Railway Company were partly within and partly without the State of Maine and the railway company resisted the payment of the tax on the ground that it was void as a regulation of interstate commerce. The State of Maine brought an action in its own courts to recover the amount of the tax assessed upon the Grand Trunk Railway Company, but on application of the defendant railway the case was transferred to the Circuit Court of the United States, which court held that this tax was a regulation of interstate commerce and gave judgment for the defendant railway, whereupon the State took an appeal to the United States Supreme Court.

MR. JUSTICE FIELD delivered the opinion of the court:

The privilege of exercising the franchise of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. * * * * The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation.

The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the rail-

road company, or any regulation of commerce which consists in such transportation.

Reversed, and cause remanded with directions to enter judgment in favor of the State for the amount of taxes demanded.

ADAMS EXPRESS COMPANY *v.* OHIO STATE AUDITOR.

165 U. S. 194. 1897.

The Ohio Statute of April 27th, 1893, as amended May 10th, 1894, known as the "Nichols Law," provided for the taxation of telegraph, telephone and express companies. Under the Statute such companies doing business in the state were required to file a return setting forth the amount, number and value of the shares of their capital stock, and also a statement in detail of their entire real and personal property, and where the same was located. Express companies were required to include in the return a statement of the *entire gross receipts*, of their business, *from whatever source derived*, for each year, and of the business done in the State of Ohio, giving the receipts of each office in the State; also the whole length of the lines of rail and water routes over which the companies did business within and without the state. The rule to be followed in making the assessments was as follows: "In determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board (board of appraisers) shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidences and rules as aforesaid." The valuation of the real estate of the companies situate in Ohio was required to be deducted from the total valuation as fixed by the Board. The property of the Adams Express Company within the State of Ohio was valued and assessed for taxation in 1895 in the sum of \$533,095.80. The express company made no return of the entire gross receipts of its business wherever done. It made return that aside from its real estate, the company owned no property in the State of Ohio, except "certain horses, wagons, harness, trucks and office fixtures located at different points" and their actual value was given in the return. The company set forth that "it employed many thousands of men who were constantly engaged in carrying express packages, many of them of great value, from one part of the country to another, and its income and the value of its shares were largely the result of their efforts, fidelity and integrity and of skilful management and supervision of the business." It also contended that it owned real and personal

property of great value aside from the appliances of its express business, which was not held or taxable in the State of Ohio, and which together with the business connections of the company and the reputation and good will earned by more than fifty years of public service entered largely into the value of its capital shares. Therefore the company claimed that the scheme of taxation was unfair, illegal, and a regulation of and a tax upon interstate commerce in contravention of the Constitution of the United States. The case, together with several others involving the same questions, came to the Supreme Court upon appeal from the Circuit Court of the United States for the Sixth District, where the statute had been upheld as constitutional.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

The principal contention is that the rule contravenes the commerce clause because the assessments, while purporting to be on the property of complainants within the state, are in fact levied on their business, which is largely interstate commerce. Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally as all business is affected by the necessity of contributing to the support of government. *Postal Tele. Cable Co. v. Adams*, 155 U. S. 688. As to railroad, telegraph, and sleeping-car companies, engaged in interstate commerce, it has often been held by this court that their property in the several states through which their lines or business extended might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any Federal restriction. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18

* * * * And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole; or taking as the basis of assessment such proportion of the capital stock of the sleeping-car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of all its

lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state. Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicated. No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, than that of railroad, telegraph, and sleeping-car companies, to roadbed, rails, and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business—whether represented in tangible or intangible property—in Ohio, possessed a value in combination and from uses in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others. We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business. * * * * But the property of an express company distributed through different states is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business. * * * * There is here no attempt to tax property having a situs outside of the state, but only to place a just value on that within. Presumptively all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used. * * * * The states through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection. and to the dividends of whose owners their citizens contribute. * * * * Considering as we do, that the unit rule may be applied to express companies without disregarding any other Federal restriction, we think it necessarily follows that this law is not open to the objection of denying the equal protection of the laws. * * * * Decrees affirmed.

UNITED STATES EXPRESS COMPANY *v.* MINNESOTA.

223 U. S. 335. 1912.

United States Express Company was an unincorporated association, with its principal office in New York, and carried on an express business in the State of Minnesota, having about fifty offices in that State. A Minnesota law provides for the payment by express companies of a tax of 6% upon their gross receipts for business done in the State for each calendar year as determined by the Auditor, "which shall be in lieu of all taxes on its property."

The Express Company contended that the assessment of the tax upon its earnings from shipments by a consignor in the State of Minnesota to an ultimate consignee within the State, which shipments were forwarded by express between the points of origin and destination, over railroads partly within and partly without the State of Minnesota, was an unconstitutional exaction in that it was an attempt of the State to regulate interstate commerce, and was without due process of law. As to such shipments, the State Court held that 9 per cent. of the taxes claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction, since it was disclosed that only 91 per cent. of the mileage was within the State. For this part of the decision the Minnesota court relied upon *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192. The Supreme Court sustained this part of the State court's decision, saying: "An examination of that case shows that it is decisive of the present one on this point, and we need not further discuss this feature of the case."

As to the transportation from points within the State to points without the State, from points without the State to points within the State, and from points without the State to points without the State, passing through the State, the transportation outside of the State being performed by connecting companies, the Supreme Court of Minnesota held that it was the intention of the legislature, in the statute under consideration, to include the earnings from these classes within the State in the gross receipts upon which the tax is based.

The transportation was made upon a through rate and through bill of lading, and, it is stipulated, consisted of a single transportation transaction, commencing with the delivery by the shipper to the express company, and continuing until the delivery of the shipment to the consignee at the ultimate destination. The Federal question raised in this connection is: Is this tax a burden upon interstate commerce, and therefore an infraction of the exclusive power of Congress, under the Constitution, to regulate commerce among the States?

MR. JUSTICE DAY delivered the opinion of the court:

The Supreme Court of Minnesota construed the tax to be a prop-

erty tax, measured by the gross earnings within the State, which, under their construction of the tax, included the earnings here in question. That court held that the statute was part of a system long in force in Minnesota, passed under the authority of the State Constitution, and was intended to afford a means of valuing the property of express companies within the State. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.

The statute itself provides that the assessments under it "shall be in lieu of all taxes upon its property." In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. In this connection, the language of Mr. Justice Peckham in *McHenry v. Alford*, 168 U. S. 65, while it was not necessary to the decision of the case, is nevertheless opposite:

"When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

The tax in the present case is not like those held invalid in the *Galveston Case* and the *Oklahoma Case*, being in addition to other state taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation seeking to reach the value of the property of such companies in the state, measured by the receipts from business done within the state. The statute was not aimed exclusively at the avails of interstate commerce (*Philadelphia & S. Mail S. S. Co. v. Pennsylvania*), but, as in the *Maine Case*, was an attempt to measure the amount of tax within the admitted power of the state by income derived, in part, from the conduct of interstate commerce. The property of express companies, being much of it of an intangible character, is difficult to reach and properly assess for taxation. This difficulty led this court in *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, to sustain a tax upon the property of an express company, which property was considered a part of one money-earning organization extending through many states.

As this court said in *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688.

"Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license

or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use; and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

We think the tax here in question comes within this principle. There is no suggestion in the present record, as was shown in *Fargo v. Hart*, 193, U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the state and the assessment made. The statute embraces receipts from all the business done within the state, including much which is purely local.

Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state.

We find no error in the judgment of the Supreme Court of the State of Minnesota, and it is affirmed.

PEMBINA CONSOLIDATED SILVER MINING, ETC., COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA.

125 U. S. 181. 1888.

The Pembina Consolidated Silver Mining and Milling Company was incorporated under the laws of Colorado for the purpose of carrying on a general mining and milling business in that state. Its principal office was in Alpine, Colorado, but it established an office in the City of Philadelphia, Pennsylvania, for the use of its officers, stockholders, agents and employes. The State of Pennsylvania assessed a tax against the corporation "at the rate of one-fourth of a mill on each dollar of its capital stock. The company refused to pay the tax upon the ground that the statute under which it was levied amounted to a regulation of interstate commerce.

The Supreme Court of Pennsylvania decided in favor of the constitutionality of the Statute. The case was then appealed to the Supreme Court of the United States.

MR. JUSTICE FIELD delivered the opinion of the court:

The exaction of a license fee to enable the corporation to have

an office for that purpose within the Commonwealth is clearly within the competency of its Legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot, with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied. In *Paul v. Virginia*, 75 U. S. 168, this court, speaking of a foreign corporation (and under that definition the plaintiff in error, being created under the laws of Colorado, is to be regarded), said: "The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States, a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their consent, it follows as a matter of course that such consent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion." A qualification of this doctrine was expressed in *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 12, so far as it applies to corporations engaged in commerce under the authority or with the permission of Congress.

* * * * The Legislature of Florida had granted to another company, for twenty years, the exclusive right to establish and maintain telegraph lines in certain counties of the State; but this exclusive grant was adjudged to be invalid as against the company acting under the law of Congress. And undoubtedly a corporation of one State, employed in business of the General Government, may do such business in other States without obtaining a license from them. Thus, to take an illustration from the opinion of Mr. Justice Bradley in a case recently decided by him, "If Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union," and, we may add, without the permission and against the prohibition of the State. *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9. These exceptions do not touch the general doctrine declared as to corporations not carrying on foreign or interstate commerce, or not employed by the Government. As to these corporations, the doctrine of *Paul v. Virginia* applies. The Colorado corporation does not come within any of the exceptions. Therefore, the recognition of its existence in Pennsylvania, even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, agents, and employes, was a matter dependent on the will of the State. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the

amount of the authorized capital of the corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State. * * * * The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal Government, is not to be restricted by State authority. *Judgment affirmed.*

Note.—*Western Union Telegraph Co. v. Kansas*, 216 U. S. 1 (1910). A statute passed by the State of Kansas in 1898 provided that foreign corporations desiring to do business in the State should make application to the State Charter Board, accompanying their applications with a fee of \$25, and if the Board granted the application they should pay for the benefit of the school fund a charter fee of 1-10 of 1 per cent, of their authorized capital stock upon the first \$100,000 of their capital, 1-20 of 1 per cent. upon the next \$400,000, and for each \$1,000,000 or major part thereof above the sum of \$500,000, \$200. The payment of this fee was made a condition precedent to the doing of business in the State. The Western Union Telegraph Company made application, stating that its authorized capital stock was \$100,000,000, whereupon the Board granted it permission to do business provided it paid a charter fee of \$20,100. The company refused to pay the tax on the ground that it violated the commerce and due process of law clauses of the United States Constitution. The Supreme Court held that the State law was unconstitutional and void. In making this decision the Court used the following language:

"It is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent. of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the State, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State. * * * * That fee, plainly, is not based on such of the company's capital stock as represented in its local business and property in Kansas. The requirement is a given per cent. of the company's authorized capital; that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that State. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the State has not chosen to ascertain and declare in the statute. It strikes at the company's entire business, wherever conducted, and its property, wherever located, and, in terms, makes it a condition of the company's telegraph right to transact purely local business in Kansas that it shall contribute, for the benefit of the State school fund, a given per cent. of its whole authorized capital, representing all of its property and all its business and interests everywhere. * * * * It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas, not only the

freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits."

S. S. WHITE DENTAL MANUFACTURING COMPANY *v.*
COMMONWEALTH OF MASSACHUSETTS.

BALTIC MINING COMPANY *v.* COMMONWEALTH OF
MASSACHUSETTS.

231 U. S. 68. Decided November 3rd, 1913.

The S. S. White Dental Manufacturing Company is a Pennsylvania corporation engaged in manufacturing and selling artificial teeth and dental supplies with an authorized capital stock of \$1,000,000, and with its principal office in Philadelphia. Its assets aggregate \$5,711,718.29. It has a usual place of business in Boston, where it keeps a supply of goods displayed for sale and in stock. The stock on hand in the Boston store, the fixtures and the current bank deposits, represented the tangible property in Massachusetts, and amounted to about \$100,000. The State of Massachusetts imposed a tax upon the corporation in accordance with the following section of its law (Mass. Pub. Stat., 1909, Chap. 490, Section 56): "Every foreign corporation shall in every year at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax, to be assessed by the tax commissioner, of 1-50 of 1 per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of \$2,000." The company paid the tax for a number of years, and then brought suit to recover back the amount it had so paid, upon the ground that the tax was a regulation of interstate commerce.

The Baltic Mining Company, a Michigan corporation, owning a copper mine with equipment in Michigan, and having an office in the city of Boston for the use of its President and Treasurer, having a total authorized capital stock of \$2,500,000, with none of its property in the State of Massachusetts, except current bank deposits, brought an action of the same character, and the two cases involving the same questions were decided in the one opinion of the court.

MR. JUSTICE DAY delivered the opinion of the court:

The mere fact that a corporation is engaged in interstate commerce does not exempt its property from State taxation. United

States Exp. Co. v. Minnesota, 223 U. S. 335. It is the commerce itself which must not be burdened by State exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part, at least, in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the State, has been sustained. * * * * It is said, that this tax is a direct burden upon interstate commerce, and an attempt to tax property beyond the jurisdiction of the State, within the authority of the Kansas cases, *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56. * * * * In *Western U. Teleg. Co. v. Kansas*, and *Pullman Co. v. Kansas*, the statute under which the State of Kansas undertook to levy a charter fee of 1-10 of 1 per cent. of their authorized capital upon the first \$100,000 of the capital stock of foreign corporations, and 1-20 of 1 per cent. upon the next \$400,000, and for each million or major part thereof, \$200, making a tax of \$20,100 against the Western Union Telegraph Company, and \$14,800 against the Pullman Company, was declared to be unconstitutional, as having the effect not simply to exert the lawful power of taxing a foreign corporation for the privilege of doing local business, but to burden interstate commerce, and to reach property represented by the capital stock of the companies, which was duly paid in and invested in property in many States, and therefore beyond the taxing jurisdiction of Kansas. Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of these cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of State and interstate character. In the *Western U. Teleg. Co.* case, the company had a large amount of property permanently located within the State, and between 800 and 900 offices constantly carrying on both State and interstate business. The Pullman Company had been running a large number of cars within the State, in State and interstate business, for many years. There was no attempt to separate the intrastate business from the interstate business by the limitations of State lines in its prosecution. * * * * In the cases at bar the business for which the companies are chartered is not, of itself, commerce. True it is, that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate

from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial, and not so connected with the interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved. In these cases the ultimate contention is not that the receipts from interstate commerce are taxed as such, but that the property of the corporations, including that used in such commerce, represented by the authorized capital of the corporations, is taxed, and therefore interstate commerce is unlawfully burdened by a State statute. While the tax is imposed by taking a percentage of the authorized capital, the agreed facts show that the authorized capital is only a part of the capital of the corporations, respectively. In the Baltic Mining Company case, the authorized capital is \$2,500,000, while the entire property and assets are \$10,766,000; and in the White Dental Company case the authorized capital is \$1,000,000, while the assets aggregate \$5,711,718.29. Further, the Massachusetts statute limits the tax to a maximum of \$2,000. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable. * * * * As this statute has been construed by the Supreme Judicial Court of Massachusetts, and applied in these cases, we are unable to find that the tax imposed violates the constitutional rights of the plaintiffs in error.

Judgments affirmed.

Dissenting: The Chief Justice, Mr. Justice Van Devanter and Mr. Justice Pitney.

2. The State Police Power as Affecting Commerce.

WILLSON *v.* BLACKBIRD CREEK MARSH COMPANY.

2 PETERS, 245. 1829.

A statute of the State of Delaware authorized the Blackbird Creek Marsh Company to erect a dam on Blackbird Creek, a navigable stream wholly within the State. By this dam property along the stream was improved, but it blocked the river and stopped navigation. Willson and others owned a sloop, regularly enrolled under an act of Congress and licensed to carry on the coasting trade.

The owners of the sloop destroyed the dam in getting their boat up the creek. The company then sued them for trespass. The owners of the sloop sought to justify their act on the theory that the Blackbird Creek being a navigable stream, was a highway of interstate commerce, and therefore the State statute permitting the company to dam it conflicted with the act of Congress, under which they were licensed. The highest court of the State gave judgment in favor of the company, whereupon an appeal was taken to the United States Supreme Court.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court.

The Act of Assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States "to regulate commerce with foreign nations and among the several States."

If Congress had passed an act which bore upon the case—any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States—we should feel not much difficulty in saying that a State law coming in conflict with such an act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

COOLEY *v.* BOARD OF WARDENS OF THE PORT OF
PHILADELPHIA.

12 HOWARD, 299. 1851.

These cases were brought to the United States Supreme Court by writs of error to the Supreme Court of Pennsylvania. They were actions to recover half-pilotage fees collected under a law of the State of Pennsylvania, passed March, 1803, providing that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master warden of the pilots, for the use of the Society for the Relief of Distressed Pilots, one-half the regular amount of pilotage. The Supreme Court of Pennsylvania sustained the validity of the fees. One of the grounds of error assigned was that the State law was repugnant to the commerce clause of the Constitution of the United States. (Art. I, Sec. 8, Clause 3).

MR. JUSTICE CURTIS delivered the opinion of the court.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. * * *

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, § 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." * * *

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by a sovereign power of a State acting in its legislative capacity, can be deemed a law, enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question whether the grant of the commercial power to Congress did *per se* deprive the States of all power to regulate pilots.

Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. * * * *

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of Power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. * * * *

If the grant of commercial power in the Constitution has deprived the States of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether Congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the States to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot legislate on this subject without violating the oaths they have taken to support the Constitution of the United States?

We are of opinion that this State law was enacted by virtue of a power residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

M'LEAN, J., and WAYNE, J., dissented; and DANIEL, J., although he concurred in the judgment of the court, yet dissented from its reasoning.

LEISY *v.* HARDIN.

135 U. S., 100. 1890.

Leisy and other persons, residents of Illinois, shipped a certain quantity of beer to Iowa to be sold there in its original package. (122 one-quarter barrels, 171 one-eighth barrels and 11 sealed cases). The beer was seized by Hardin, Marshal, of the city of Keokuk, Iowa, under an Iowa statute which forbade the sale of liquor except for medicinal purposes. This action was brought originally in the Superior Court of Keokuk, which court awarded to Leisy the return of the property. This judgment was reversed by the Supreme Court of Iowa, whereupon the decision was brought to the United States Supreme Court for review.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which the commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons v. Ogden*, 9 Wheat. 1. *Brown v. Maryland*, 12 Wheat. 419.

And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action. *Henderson v. Mayor of New York*, 92 U. S., 259. The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a

general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws and laws in relation to bridges, ferries and highways, belongs to a class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity and to the protection, the safety and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government. Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. *Cooley v. Port Wardens*, 12 How. 299. * * * *

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled.

That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State, or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control? * * * *

The doctrine now firmly established is, as stated by Mr. Justice Field, in *Bowman v. Chicago, &c., Railway Co.*, 125 U. S., 507, "that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges, over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. * * * *

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.* * * *

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman v. Chicago, &c., Railway Co.*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled

in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in *Gibbons v. Ogden*, 9 Wheat. 1, 238, in "a frank and candid co-operation for the general good."

The legislation in question is to the extent indicated repugnant to the third clause of Section 8 of Art. 1 of the Constitution of the United States, and therefore the judgment of the Supreme Court of Iowa is

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Note.—Immediately after this decision Congress passed the Act of August 8 1890, known as the **Wilson Act**, which provides: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The validity of this act was upheld in *In re Rahrer*, 140 U. S. 545.

See also the Webb Act in appendix, page 338, and *Adams Express Co. v. Kentucky*, with note thereto, page 339.

AUSTIN *v.* TENNESSEE.

179 U. S., 343. 1900.

The State of Tennessee forbade the sale of cigarettes within the State under the following act of 1897: "It shall be a misdemeanor for any person, firm or corporation to sell, offer to sell, or bring into the State for the purpose of selling, giving away or otherwise disposing of any cigarettes, cigarette paper, or substitute for the same." * * *

Austin was convicted of a violation of the statute and committed to jail until payment of a fine. The facts of the case showed that the defendant had purchased a lot of cigarettes from the American Tobacco Company, in Durham, North Carolina, where the same had been manufactured and put into pasteboard boxes containing ten cigarettes each, properly marked, stamped and labeled as prescribed by the United States revenue laws. That after the purchase, the American Tobacco Company piled upon the floor of its warehouse, in Durham, the number of boxes or packages sold and notified the Southern Express Company to come and get them. The express company placed them in an open basket and delivered them to the defendant in Tennessee. The defendant sold one of the packages of ten cigarettes without breaking it. The Supreme Court of Tennessee upheld the conviction on the ground that (1) cigarettes were not legitimate articles of commerce; (2) the packages in which the cigarettes were sold were not original packages in the true commercial sense. Appeal was taken to the Supreme Court of the United States.

MR. JUSTICE BROWN delivered the opinion of the court.

It is charged that the act in question, in its application to the facts of the case, is an infringement upon the exclusive power of Congress to regulate commerce between the States. This is the sole question presented for our determination. We are not disposed to question the general principle that the States cannot, under the guise of inspection or revenue laws, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless, or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the State, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. We are not prepared to fully indorse the opinion of the court, upon the first point. Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce, although it may to a certain extent be within the police power of the States. Of this

class of cases is tobacco. From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit or other articles, the use of which is a menace to the health of the entire community * * * there is no reason to doubt the good faith of the legislature of Tennessee in prohibiting the sale of cigarettes as a sanitary measure, and if it be inoperative as applied to sales by the owner in the original packages, of cigarettes manufactured in and brought from another State, we are remitted to the inquiry whether a paper package of three inches in length and one and one-half inches in width, containing ten cigarettes is an original package protected by the Constitution of the United States against any interference by the State while in the hands of the importer? The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which bona-fide transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of State laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country. * * * And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. We can only look upon it as a discreditable subterfuge, to which this court ought not to lend its countenance. If there be any original package at all in this case, we think it is the basket and not the paper box. We are satisfied that the conclusion of the Supreme Court of Tennessee is correct, and it is therefore

Affirmed.

SCHOLLENBERGER v. PENNSYLVANIA.

171 U. S., 1. 1898.

Schollenberger with others was convicted of a violation of a statute of Pennsylvania, Act of May 21, 1885, which prohibited the sale of oleomargarine. From the evidence it appeared that Schollenberger was the agent in Pennsylvania for the sale of the product on behalf of a manufacturer in Rhode Island. Also, the manufacturer and agent had complied with the provisions of the Act of Congress of August 2, 1886, imposing a tax upon the business. A tub containing forty pounds of oleomargarine, packed, stamped and branded as required by the Act of Congress was shipped to Schollenberger from Rhode Island, who sold the same to a pur-

chaser, as an article of food. The Supreme Court of Pennsylvania upheld the constitutionality of the State statute on the ground that it was a legitimate exercise of the police power of the State in protecting the health of its citizens; also, that the statute did not prevent oleomargarine being brought within the State and sold to the wholesale dealer in original packages, but affected only its retail sale. An appeal from this decision was taken to the Supreme Court of the United States.

MR. JUSTICE PECKHAM delivered the opinion:

In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? No affirmative evidence from witnesses called to the stand and speaking directly on that subject is found in the record. We must determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety. (The court then discusses the Act of Congress of 1886 regulating the manufacture and sale of oleomargarine and reaches the conclusion that it is a recognized article of commerce.)

This act shows that Congress at the time of its passage in 1886 recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries. Its manufacture was recognized as a lawful pursuit, and taxation was levied upon the manufacturer of the article, upon the wholesale and retail dealers therein, and also upon the article itself. * * * *

Upon all these facts we think it apparent that oleomargarine has become a proper subject of commerce among the States and with foreign nations.

The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food. * * * *

We do not think the fact that the article is subject to be adulterated by dishonest persons, in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right of any State through its legislature to forbid the introduction of the unadulterated article into the State. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopaedias, but

there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a State to absolutely prohibit the introduction within its borders of an article of commerce, which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one. * * * *

We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary here to determine. We do say that a sale of a ten pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within the State. *Waring v. The Mayor*, 8 Wall. 110, 122. The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having the right to sell through his agent, a sale thus effected is valid.

The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the State to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the State law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interferes with interstate commerce. It cannot for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome. The Act of the Legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another State and its sale in the original package, as described in the special verdict, is invalid.

The judgments are therefore reversed and the cases remanded to the Supreme Court of Pennsylvania for further proceedings not inconsistent with this opinion.

MINNESOTA *v.* BARBER.

136 U. S., 313. 1890.

Henry E. Barber was convicted of the offence of offering meat for sale in Minnesota in violation of a statute of the State passed April 16, 1889. The act of 1889 was entitled "An act for the protection of the public health by providing for inspection, before slaughter, of cattle, sheep and swine designed for slaughter for human food." By the third section of the act it was declared to be the duty of the inspectors appointed under the act to inspect all cattle, sheep and swine slaughtered for human food within their respective jurisdictions within twenty-four hours before the slaughter of the same, and if found healthy and in suitable condition to be slaughtered for human food to give to the applicant a certificate in writing to that effect. If found unfit for food, such inspectors were to order the immediate removal and destruction of such diseased animals. The act made it a misdemeanor punishable by fine and imprisonment to expose or offer for sale any meat which had been taken from an animal not so inspected and certified before slaughter. Barber sued out a writ of *habeas corpus* to be released from jail in the Circuit Court of the United States for the District of Minnesota upon the ground that the act of 1889 was repugnant to the provision of the Constitution giving Congress power to regulate commerce among the several States. The Circuit Court held the statute to be in violation of the Constitution and discharged the prisoner from custody. The State of Minnesota then appealed to the United States Supreme Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

As the inspection must take place within the twenty-four hours immediately before the slaughtering, the act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb or pork—in whatever form, and although entirely sound, healthy, and fit for human food—taken from animals slaughtered in other States; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State. This must be so, because the time, expense and labor of sending animals from points outside of Minnesota to points in that State to be there inspected, and bringing them back, after inspection to be slaughtered at the place from which they were sent—the slaughtering to take place within twenty-four hours after inspection, else the certificate of inspection becomes of no value—will be so great as to amount to an absolute prohibition upon sales in Minnesota, of meat from animals not slaughtered within its limits. When to this is added the fact that the statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly,

in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of that State and to compel the people of Minnesota wishing to buy such meats, either to purchase those taken from animals slaughtered in the State, or to incur the cost of purchasing them, when desired for their own personal use, at points beyond the State, that object is attained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result. * * * *

A law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the products of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep or swine, actually diseased, or meats that by reason of their condition, or the condition of the animal from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare as does Minnesota by the necessary operation of its statute that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State.

In the opinion of the court the statute in question * * * is in violation of the Constitution and void.

Judgment discharging the appellee (Barber) from custody is affirmed.

GEORGE M'DERMOTT *v.* STATE OF WISCONSIN.T. H. GRADY *v.* STATE OF WISCONSIN.

228 U. S. 115. 1913.

The State of Wisconsin enacted a law in 1907 making it a misdemeanor to sell any syrup or molasses, unless the barrel, cask, keg, can, pail or other original container containing the same be distinctly branded or labeled so as to plainly show the true name of each and all the ingredients composing such mixture, as follows: "*In case such mixture shall contain glucose in a proportion exceeding GE per cent. by weight, it shall be labeled and sold as 'Glucose flavored with Maple Syrup,' 'Glucose flavored with Sugar-cane Syrup,' * * 'Glucose flavored with Refiners' Syrup,' * * as the case may be. * * The mixture or syrups designated in this section shall have no other designation or brand than herein required that represents or is the name of any article which contains a saccharin substance.*" McDermott and Grady were retail merchants in Oregon, Wisconsin, and each had bought for himself for resale from wholesale grocers in Chicago, and had received by rail from that city twelve one-half gallon tin cans or pails of Karo Corn Syrup, each shipment being made in wooden boxes containing the cans. When the goods were received at their stores, McDermott and Grady took the cans from the boxes, placed them on shelves for sale at retail, and destroyed the boxes in which the goods were shipped to them as was customary in such cases. The cans which were sent to McDermott were labeled "Karo Corn Syrup, 10% Cane Syrup, 90% Corn Syrup." The cans which were sent to Grady were labeled "Karo Corn Syrup with Cane Flavor, Corn Syrup, 85%."

Proceedings were brought against Grady and McDermott for violations of the State Pure Food Law. They defended on the ground that they had complied with the Federal Pure Food and Drugs Act passed by Congress under authority of the Constitution of the United States, and that their labels were in conformity with the requirements of the Federal Act as interpreted by the proper Federal officials, and introduced in evidence a letter from the Secretaries of Agriculture, Commerce and Labor made under the claimed authority of that Act which authorized the branding of "Karo" as "corn syrup with cane flavor."

The defendants claimed that in order to comply with the State law they would have to remove the labels which they put on in order to comply with the Federal law, that the Federal Food and Drugs Act has taken possession of this field of regulation, and that the State Act is a wrongful interference with the exclusive power of Congress over interstate commerce in which the goods in question were shipped.

MR. JUSTICE DAY delivered the opinion of the Court :

To require the removal or destruction before the goods are sold of the evidence which Congress has by the food and drugs act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the Federal law, is beyond the power of the State. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statutes is an act in excess of its legitimate power.

It is insisted, however, that, since at the time when the State act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error, and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original-package doctrine as it is said to have been laid down in the former decisions in this court. The term "original-package" had its origin in *Brown v. Maryland*, 12 Wheat. 419, in which this court had to consider the extent of the protection given under Federal authority to articles imported into this country from abroad for sale, and it was there held that (p. 441) :

"When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

That doctrine has been many times applied in the decisions of this Court in defining the line of demarcation which shall separate the Federal from the State authority where the sovereign power of the nation or State is involved in dealing with property. And where it has been found necessary to decide the boundary of Federal authority, it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce, and delivered to the consignee, and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted. * * * * In the view, however, which we take of this case, it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original-package. For, as we have said, keeping within its constitutional limitation of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination,

and seizure necessary to enforce the prohibitions of the act, and when Sec. 2 has been violated, the Federal authority, in enforcing either Sec. 2 or Sec. 10, may follow the adulterated or misbranded article at least to the shelf of the importer.

Congress, having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in Sec. 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one State, territory, district, or insular possession to another for sale, or, having been transported, remaining "unloaded, unsold, or in original unbroken packages," and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection en route may be very inadequate. The real opportunity of government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped, and remain, as the act provides, "unsold." It is enough, by the terms of the act, if the articles are unsold, whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of Sec. 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.

The doctrine of original package had its origin in the opinion of Chief Justice Marshall in *Brown v. Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of interstate into State jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a Federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles, and to choose appropriate means to that end. The legislative means provided in the Federal law for its own enforcement may not be thwarted by State legislation having a direct effect to impair the effectual exercise of such means.

For the reasons stated, the statute of Wisconsin, in forbidding all labels other than the one it prescribed, is invalid, and it follows that the judgments of the State court affirming the convictions of the plaintiffs in error for selling the articles in question without the exclusive brand required by the State must be reversed, and the cases are remanded to the State court for further proceedings not inconsistent with this opinion.

INTERNATIONAL TEXT-BOOK COMPANY *v.* AARON T. PIGG.

217 U. S. 91. 1910.

The International Text-book Company is a Pennsylvania corporation, and the proprietor of the International Correspondence Schools at Scranton, Pennsylvania. The company has a capital stock, and the profits arising from its business are distributed in dividends, or applied otherwise, as the company may elect. The company prepares and publishes instruction papers, text-books and illustrative apparatus for courses of study, and forwards the same from time to time to students. It employs local or traveling agents called solicitor-collectors, who procure applications for scholarships in the correspondence schools, and who also collect and forward to the company deferred payments on scholarships. The solicitor-collector for the State of Kansas maintains an office in the said State, at his own expense, the company itself having no office of its own in the State. The defendant, Aaron T. Pigg, signed a written contract with the company at Topeka, Kansas, which was accepted at Scranton, for a course in commercial law. The company brought suit in a Kansas court to recover an unpaid balance due by him upon his contract.

A statute of Kansas (Section 1283, Kansas General Statutes of 1901) provides that it should be the duty of the president and secretary or of the managing officer of each corporation for profit, doing business in the State, except banking, insurance and railroad corporations, annually, on or before the 1st day of August, to prepare and deliver to the Secretary of State a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement was to set forth the authorized capital stock, the paid-up stock, the par and market value per share of stock, the assets and liabilities of the corporation, and a list of its stockholders and officers. The statute then provided; “* * * * and the failure to file such statement by any corporation doing business in this State, and not organized under the laws of this State, shall work a forfeiture of its right or authority to do business in this State. * * * * No action shall be maintained or recovery had in any of the courts of this State by any corporation doing business in this State without *first* obtaining the certificate of the Secretary of State that the statements provided for in this section (1283) have been properly made.”

The company did not, before bringing this suit, file the statement required. The Supreme Court of Kansas decided that the company was not entitled to maintain its suit in the courts of Kansas. The company contended that the effect of the statute was to discriminate against it as an agency engaged in interstate commerce.

MR. JUSTICE HARLAN delivered the opinion of the court:

In view of the nature and extent of the business of the International Text-book Company in Kansas, the first inquiry is whether the statutory prohibition against the maintaining of an action in a Kansas court by "any corporation *doing business in this (that) State*" embraces the plaintiff corporation. It must be held, as the State court held, that it does; for it is conceded that the Text-book Company did not, before bringing this suit, make, deliver, and file with the Secretary of State either the statement or certificate required by § 1283; and upon any reasonable interpretation of the statute, that company, both at the date of the contract sued on, and when this action was brought, must be held as "*doing business*" in Kansas. * * * But this view as to the meaning of the Kansas statute does not necessarily lead to an affirmance of the judgment below, if, as the plaintiff contends, the business in which it is regularly engaged is interstate in its nature, and if the statute, by its necessary operation, materially or directly burdens that business. It is true that the business in which the International Text-book Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the States within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse, between the Text-book Company, located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that, this mode—looking at the contracts between the Text-book Company and its scholars—involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus, and papers, useful or necessary in the particular course of study the scholar is pursuing, and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different States—particularly when it is in execution of a valid contract between them—is as much intercourse in the constitutional sense, as intercourse by means of telegraph—"a new species of commerce," to use the words of this court in *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1. * * * Was it competent for the State to prescribe, as a condition of the right to the Text-book Company to do interstate business in Kansas, such as was transacted with Pigg, that it should prepare, deliver, and file with the Secretary of State the statement mentioned in § 1283? The above question must be answered in the negative upon the authority of former adjudications by this court. A case in point is *Crutcher v. Kentucky*, 141 U. S. 47, often referred to and never qualified by any subsequent decision. That case arose under a statute of Kentucky regulating agencies of foreign express companies. The statute required as a condition of the right of the

agent of an express company not incorporated by the laws of Kentucky, to do business in that Commonwealth, to take out a license from the State Auditor, and to make and file in the Auditor's office a statement showing that the company had an actual capital of a given amount, either in cash or in safe investments, exclusive of costs. These requirements were held by this court to be in violation of the Constitution of the United States in their application to foreign corporations engaged in interstate commerce. * * * *

It is true that the statute does not, in terms, require the corporation of another State engaged in interstate commerce to take out what is technically "a license" to transact its business in Kansas. But it denies all authority to do business in Kansas unless the corporation makes, delivers, and files a "statement" of the kind mentioned in § 1283. The effect of such requirement is practically the same as if a formal license was required as a condition precedent to the right to do such business. In either case it imposes a *condition* upon a corporation of another State seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The State cannot thus burden interstate commerce. It follows that the particular clause of § 1283 requiring that "statement" is illegal and void. * * * * How far a corporation of one State is entitled to claim in another State, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts, is a question which the exigencies of this case do not require to be definitely decided. * * * * It results that the provision as to the statement in § 1283 must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of *the same section* which provides that the obtaining of the certificate of the Secretary of State that such statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas.

The judgment must be reversed.

Note 1.—In *Lake Shore & Michigan Southern Railway Company v. State of Ohio*, 173 U. S. 285 (1899), the Supreme Court held constitutional the Ohio Statute of April 18th, 1889, which provided that each railroad company should cause three, each way, of its regular trains carrying passengers to stop at a station, city or village containing over three thousand inhabitants, for a time sufficient to receive and let off passengers. The railway company failed to stop three of its trains at West Cleveland, a municipality of Ohio having over three thousand inhabitants. In an action brought to recover the penalties mentioned in the act, the Supreme Court, by Justice Harlan said: "It cannot be adjudged that the Ohio statute is unconstitutional. The power of a State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety. In what has been said we have assumed that the statute is not in itself unreasonable; that is, it has appropriate relation to the public convenience, does not go beyond the

necessities of the case, and is not directed against interstate commerce. * * * * The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if in the contingency named in the statute the required number of trains stop at each place containing three thousand inhabitants long enough to receive and let off passengers. * * * * We perceive in the legislation of Ohio no basis for the contention that the State has invaded the domain of national authority or impaired any right secured by the National Constitution. * * * *

Note 2.—Cleveland, Cincinnati, Chicago & St. Louis Railway Company *v.* Illinois, 177 U. S. 514 (1900). The statute of Illinois of March 21st, 1874, provided that all regular passenger trains of every railroad company operating within the State should stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety. The railroad company ran a fast train called the Knickerbocker Special between St. Louis and New York, devoted exclusively to carrying interstate traffic between the points named. The company did not stop the special train at Hillsboro, a county seat in the State of Illinois, but provided other trains which adequately accommodated the local traffic to and from Hillsboro. The Court held that the statute was a direct burden upon interstate commerce, and therefore unconstitutional. It said: "It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through States in which no such restrictions were applied. * * * * The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares; requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal light to be carried at night, tariff and time tables to be posted at proper places and other similar requirements contributing to the safety, comfort, and convenience of their patrons—is too obvious to require discussion."

POWER OF STATE TO REGULATE RATES.

GEORGE T. SIMPSON *v.* DAVID C. SHEPARD, ETC.

MINNESOTA RATE CASES.

Decided by U. S. Supreme Court June 9, 1913.

These suits were brought by stockholders of the Northern Pacific Railway Company, the Great Northern Railway Company and the Minneapolis & St. Louis Railroad Company, respectively, to restrain the enforcement of two orders of the Railroad & Warehouse Commission of the State of Minnesota, and two acts of the legislature

of that State, prescribing maximum charges for transportation of freight and passengers, and to prevent the adoption or maintenance of these rates by the railroad companies. In addition to the companies, the Attorney General of the State, the members of the Railroad and Warehouse Commission, and also, in the cases of the Northern Pacific and Great Northern Companies, certain representative shippers were made defendants.

The orders and acts, which, by their terms related solely to charges for intrastate transportation, were as follows:

(1) The commission's order of September 6, 1906, effective November 15, 1906, fixing the maximum class rates for general merchandise.

(2) The act approved April 4, 1907, to take effect May 1, 1907, prescribing 2 cents a mile as the maximum fare for passengers, except for those under twelve years of age, for whom the maximum rate was to be 1 cent a mile. Laws of 1907, chap. 176.

(3) The act approved April 18, 1907, to take effect June 1, 1907, fixing maximum commodity rates for carload lots of specified weights. Laws of 1907, chap. 232.

(4) The commission's order of May 3, 1907, effective June 3, 1907, establishing maximum "in-rates" for designated commodities in carload lots from St. Paul, Minneapolis, Minnesota Transfer, and Duluth to certain distributing centers. No complaint is made of this order in the case of the Minneapolis & St. Louis Railroad Company.

The complainants assailed the acts and orders upon the grounds (1) that they amounted to an unconstitutional interference with interstate commerce; (2) that they were confiscatory, and (3) that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law.

MR. JUSTICE HUGHES delivered the opinion of the court.

First As to interference with interstate commerce.

None of the acts and orders prescribes rates for goods or persons moving in interstate commerce. By their terms, they apply solely to commerce that is internal. Despite this obvious purport, it has been found below that the inevitable effect of the State's requirements for intrastate transportation was to impose a direct burden upon interstate commerce, and to create unjust discriminations between localities in Minnesota and those in adjoining States; and hence, that they must fall, as repugnant to the commerce clause and to the action of Congress under it. * * *

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of

such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting State legislation. *Cooley v. Port Wardens*, 12 How. 299, 319.

The principle which determines this classification underlies the doctrine that the States cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains.

Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. (*State Freight Tax Case*, 15 Wall. 232.)

They have no power to prohibit interstate trade in legitimate articles of commerce (*Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 481, 485), or to prescribe the rates to be charged for transportation from one State to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection (*Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 577).

But within these limitations there necessarily remains to the States until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by State legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate com-

merce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible. * * * *

(The court gives illustrations of State pilotage laws, harbor regulations, quarantine and inspection laws which have been sustained.)

And whenever, as to such matters, under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the State power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority.

(2) These principles apply to the authority of the State to prescribe reasonable maximum rates for intrastate transportation.

State regulation of railroad rates began with railroad transportation. The railroads were chartered by the States, and from the outset, in many charters, maximum rates for freight or passengers, or both, were prescribed. Frequently—and this became the more general practice—the Board of Directors was permitted to fix charges in its discretion,—an authority which, in numerous instances, was made subject to a limitation upon the amount of net earnings. In several States maximum rates were also established, or the power to alter rates was expressly reserved, by general laws. In 1853, the State of New York fixed the maximum fare for way passengers on the railroads forming the line of the New York Central at 2 cents a mile (Laws of 1853, chap. 76, § 7), and this rate extending to Buffalo and Suspension Bridge, on the boundary of the State, has continued to the present day (Consol. Laws [N. Y.], chap. 49, § 57). As a rule the restrictions imposed by the early legislation were far from onerous, but they are significant in the assertion of the right of control. More potent than these provisions, in the actual effect upon railroad tariffs, was the State canal. It is a matter of common knowledge that the traffic on the trunk lines from the Atlantic seaboard to the West was developed in competition with the Erie Canal, built, maintained, and regulated by the State of New York to promote its commerce. * * * *

The doctrine was thus fully established that the State could not prescribe interstate rates, but could fix reasonable intrastate rates throughout its territory.

Second. Are the State's acts and orders confiscatory?

The rate-making power is a legislative power and necessarily implies a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the legislature, or of the commission lawfully constituted by it, as to matters within the province of either. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446, 47 L. ed. 892, 896, 23 Sup. Ct. Rep. 571. The case falls within a well-defined category. Here we have a general schedule of rates, involving the profitableness of the intrastate operations of the carrier, taken as a whole, and the inquiry is whether the State has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due process of law, and denied the equal protection of the laws.

The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title, but to the right to receive just compensation for the service given to the public. *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307.

In determining whether that right has been denied, each case must rest upon its special facts. But the general principles which are applicable in a case of this character have been set forth in the decisions.

(1) The basis of calculation is the "fair value of the property" used for the convenience of the public.

(2) The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. The scope of the inquiry was thus broadly described in *Smyth v. Ames* (169 U. S. pp. 546, 547): "In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original, cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is en-

titled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

(3) Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the *Smyth Case* (*id.* p. 541). The reason, as there stated, is that the State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business. * * * *

Our conclusions may be briefly stated. The statements of the complainants' witnesses as to the extra cost of interstate business, while entitled to respect as expressions of opinion, manifestly involve wide and difficult generalizations. They embrace, without the aid of statistical information derived from appropriate tests and submitted to careful analysis, a general estimate of all the conditions of transportation, and an effort to express in the terms of a definite relation, or ratio, what clearly could be accurately arrived at only by prolonged and minute investigation of particular facts with respect to the actual traffic as it was being carried over the line. The extra cost, as estimated by these witnesses, is predicated not simply of haulage charges, but of all the outlays of the freight service, including the share of the expenses for maintenance of way and equipment assigned to the freight department. And the ratio, to be accurately stated, must also express the results of a suitable discrimination between the interstate and intrastate traffic on through and local trains respectively, and of an attribution of the proper share of the extra cost of local train service to the interstate traffic that uses it. The wide range of the estimates of extra cost, from three to six or seven times that of the interstate business per ton mile, shows both the difficulty and the lack of certainty in passing judgment.

We are of opinion that, on an issue of this character, involving the constitutional validity of State action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting *data* from which such extra cost as there may be, of intrastate business, may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or

statistics prepared, at least during test periods, properly selected. It may be said that this would have been a very difficult matter, but the company, having assailed the constitutionality of the State acts and orders, was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate *data* which would permit the court to draw the right conclusion.

We need not separately review the findings with respect to the division of passenger expenses, as the same considerations are involved, with the distinction, however, that the extra cost attributed to the intrastate business is relatively small as compared with that charged to intrastate freight. And, in view of the conclusions reached on the controlling questions we have considered, we express no opinion with respect to the method adopted in dividing expenses between the passenger and freight departments.

For the purpose of determining whether the rates permit a fair return, the results of the entire intrastate business must be taken into account. During the test year the entire revenue, as found, from the intrastate business, passenger and freight, amounted to \$2,897,912.26. All the rates in question were in force save the commodity rates, and it is further found that the loss that would have accrued in intrastate commodity business, by the application of the commodity rates which were under injunction, would have amounted to \$21,493.67.

As neither the share of the expenses properly attributable to the intrastate business, nor the value of the property employed in it, was satisfactorily shown, and hence it did not appear upon the facts proved that a fair return had been denied to the company, we are of the opinion that the complainant failed to sustain his bill.

(The decrees of the court below enjoining the enforcement of the intrastate rates of interstate carriers as fixed by the State were reversed in two of the cases and modified in the third case.)

HOUSTON, EAST AND WEST TEXAS RAILWAY COMPANY *v.* UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, ET AL.

(THE SHREVEPORT CASE.)

234 U. S. 342.

A complaint was filed with the Interstate Commerce Commission that the Houston, East and West Texas Railway Company and the Texas & Pacific Railway Company maintained unreasonable rates

as interstate carriers from Shreveport, Louisiana, to various points in Texas, and unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas. The basis of the complaint was that the carriers made rates out of Dallas and other Texas points into eastern Texas which were much lower than those which they fixed from Shreveport into Texas. The situation may be thus specifically described: Shreveport, Louisiana, is about 40 miles from the Texas State line, and 231 miles from Houston, Texas, on the line of the Houston, etc., Railway Company; it is 189 miles from Dallas, Texas, on the line of the Texas & Pacific Railway. Shreveport competes with both cities for the trade of the intervening territory. The rates on these lines from *Dallas* and *Houston*, respectively, *eastward* to intermediate points in Texas were much less, according to distance, than from *Shreveport westward* to the same points. It was undisputed that the difference was substantial, and injuriously affected the commerce of Shreveport. It appeared, for example, that a rate of 60 cents carried first-class traffic a distance of 160 miles to the *eastward* from Dallas, while the same rate would carry the same class of traffic only 55 miles *westward* from Shreveport into Texas.

The Interstate Commerce Commission directed the carriers to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged from Dallas and Houston toward Shreveport for equal distances.

The carriers petitioned the Commerce Court for a reversal of the order made by the Interstate Commerce Commission, contending that Congress (through the Commission) had no power to control *the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic*. The Commerce Court affirmed the order of the Interstate Commerce Commission.

An appeal was then taken to the Supreme Court of the United States.

MR. JUSTICE HUGHES delivered the opinion of the Court:

We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so

as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of State authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden.

It is to be noted—as the government has well said in its argument in support of the Commission's order—that *the power to deal with the relations between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority.* This question was presented with respect to the long and short haul provision of the Kentucky Constitution, adopted in 1891, which the court had before it in *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27. The State court had construed this provision as embracing a long haul, from a place outside to one within the State, and a shorter haul on the same line and in the same direction between points within the State. This court held that, so construed, the provision was invalid as being a regulation of interstate commerce because "it linked the interstate rate to the rate for the shorter haul, and thus the interstate charge was directly controlled by the State law." (See 230 U. S. pp. 428, 429.) It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.

The Decree of the Commerce Court is affirmed.

Section 3.**POWER OF CONGRESS OVER THE CURRENCY.****THE LEGAL TENDER CASES.****HEPBURN v. GRISWOLD.**

8 WALLACE, 603. 1869.

In this case a certain Mrs. Hepburn made a promissory note, dated June 20, 1860, by which she promised to pay to one Henry Griswold on February 20, 1862, the sum of \$11,250. There was at the time the note was made, and at the time it fell due no lawful money of the United States but gold and silver coin. The note was not paid at maturity. On February 25, 1862, in a crisis of the nation, Congress authorized the issue of \$150,000,000 of its own notes and enacted in regards to them "Such notes * * * shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports, etc." These notes were issued on the credit of the United States alone. In March, 1864, suit was brought upon the note. Mrs. Hepburn tendered the United States notes issued under the act in satisfaction and payment of Griswold's claim. The tender was refused, and the money paid into court. On appeal from the State courts, the cause was brought into the United States Supreme Court.

CHIEF JUSTICE CHASE delivered the opinion of the court:

Applying the rule just stated (*i. e.*, that statutes shall be construed so as not to be unjust and inequitable, if another sense, consonant with those principles can be given to them), there appears to be strong reason for construing the word "debts" as having reference only to debts contracted subsequent to the enactment of the law. For no one will question that the United States notes, which the act makes a legal tender in payment, are essentially unlike in nature, and being irredeemable in coin, are necessarily unlike in value, to the lawful money intended by parties to contracts for the payment of money made before its passage. * * * Contracts for the payment of money, made before the act of 1862, had reference to coined money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Every such contract, therefore, was in legal import, a contract for the payment of coin. (The court discusses the question whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable in gold and silver coin, and concludes the opinion as follows:*) * * * We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a

means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution. We are obliged, therefore, to hold that the defendant (Griswold) was not bound to receive from the plaintiff the currency tendered to him in payment of the note, made before the passage of the act of February 25, 1862.

KNOX *v.* LEE.

PARKER *v.* DAVIS.

12 Wallace, 79 U. S., 457. 1871.

In the case of *Knox v. Lee*, a suit was brought in the Circuit Court of the United States for the Western District of Texas by Lee to recover the value of certain sheep, which Knox had purchased at a confiscation sale held under the authority of the so-called Confederate States. Upon the trial of the case the judge charged the jury as follows: "It appears from the evidence that these sheep were confiscated as the property of an alien enemy, and sold under the authority of the so-called Confederate Government, March 7, 1863, and the defendant Knox, in connection with others, perhaps, became the purchaser thereof. I have to say to the jury that such sale conferred no title whatsoever upon the purchaser or upon any one knowing that title was derived from this source." The plaintiff Lee during the trial, offered to prove the difference in value between specie (gold and silver) and United States currency generally known as greenbacks, for the purpose of showing that gold and silver had a greater value than greenbacks, and for the purpose of allowing the jury to estimate the difference between the two. The defendant Knox objected to this testimony on the ground that United States currency was made legal tender by law, and there was no difference in value between the two in law. The court sustained the objection and excluded all such evidence, saying to the jury:

"In assessing damages, the jury will recollect that whatever amount they may give by their verdict can be discharged by the payment of such amount in legal tender notes of the United States." Judgment having been given for the plaintiff, the defendant Knox sued out this writ of error to the Supreme Court.

The case of *Parker v. Davis* arose in the Supreme Judicial Court of Massachusetts, upon a bill in equity filed by Davis to compel Parker to perform a contract to convey a lot of woodland upon the payment of a given sum of money. This contract was dated and the suit brought upon it prior to the passage of the Act of Congress of February 25, 1862, which provided for a paper currency. The Supreme Court of Massachusetts decreed that Parker should

execute to Davis a deed of the land in question, upon Davis' paying into court the consideration money mentioned in the contract. In pursuance of that decree, Davis paid the said sum into court in legal tender or treasury notes of the United States. The defendant refused to execute the deed, claiming that the money should be paid to the court in coin. The court then ordered that the plaintiff Davis should pay the specified amount in treasury notes of the United States. From this order the defendant Parker sued out a writ of error to the United States Supreme Court.

The Supreme Court on April 10, 1871, ordered that the two cases, together with others pending upon the same question, be heard upon the following propositions:

1. Is the Act of Congress, known as the Legal Tender Act, constitutional as to contracts made before its passage.
2. Is it valid, as applicable to transactions since its passage.

MR. JUSTICE STRONG delivered the opinion of the court:

The controlling questions in these cases are the following: Are the Acts of Congress, known as the legal tender acts, constitutional when applied to contracts made before their passage? And, secondly, are they valid as applicable to debts contracted since their enactment? These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will effect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States) the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the Acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, wide-spread distress and the rankest injustice. The debts which have been contracted since February 25, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the Acts of Congress declaring treasury notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed legal tender treasury notes have become the universal measure of values. If now, by our decision it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes

are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume, a large percentage is added to every debt and such must become the demand for gold to satisfy contracts that ruinous sacrifices, general distress and bankruptcy may be expected. These consequences are too obvious to admit of question. * * * *

The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the Constitution and the Legal Tender Acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect of a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. In *Commonwealth v. Smith*, 4 Binn. 123, the language of the court was, "It must be remembered that, for weighty reasons, it has been assumed as a principle, in construing constitutions by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States that an Act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt." * * * *

With these rules of constitutional construction before us settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us. Before we can hold the legal tender acts unconstitutional, we must be convinced that they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness) or we must hold that they were prohibited. This brings to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary

sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the War and Navy Departments for supplies exceeded fifty millions and the current expenditure was over one million per day. The entire amount of coin in the country, including that in private hands, as well as that in banking institutions was insufficient to supply the need of the government for three months, had it all been poured into the treasury. Foreign credit we had none. We say nothing of the overhanging paralysis of trade and of business generally, which threatened loss of confidence in the ability of the government to maintain its continued existence, and therewith the complete destruction of all remaining national credit.

It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency that the Legal Tender Acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the Treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the Legal Tender Acts would, could any one be bold enough to assert that Congress transgressed its powers? If these enactments did work these results, can it be maintained now that they were not for a legitimate end, or "appropriate and adapted to that end," in the language of Chief Justice Marshall? That they did work such results is not to be doubted. Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of the nation and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments?

But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed that treasury notes without the legal tender clause might have been issued and that the necessities of the government might thus have been supplied. Hence it is inferred that there was no necessity for giving to the notes issued the capability of paying private debts. At best this is a mere conjecture. But, admitting it to be true, what does it prove? Nothing more than that Congress

had the choice of means for a legitimate end, each appropriate, and adapted to that end, though, perhaps in different degrees. What then? Can this court say that it ought to have adopted one rather than the other? Is it our province to decide that the means selected were beyond the constitutional power of Congress because we may think that other means to the same ends would have been more appropriate and equally efficient? That would be to assume legislative power, and to disregard the accepted rules for construing the constitution. * * * *

It is plain to our view, however, that none of these measures which it is now conjectured might have been substituted for the Legal Tender Acts could have met the exigencies of the case, at the time when those acts were passed. We have said that the credit of the government had been tried to its utmost endurance. Every new issue of notes which had nothing more to rest upon than government credit, must have paralyzed it more and more, and rendered it increasingly difficult to keep the army in the field, or the navy afloat. It is an historical fact that many persons and institutions refused to receive and pay those notes which had been issued, and even the head of the treasury represented to Congress the necessity of making the new issues legal tenders, or rather, declared it impossible to avoid the necessity. The vast body of men in the military service was composed of citizens who had left their farms, their workshops, and their business with families and debts to be provided for. The government could not pay them with ordinary treasury notes, nor could they discharge their debts with such a currency. Something more was needed, something that had all the uses of money. And as no one could be compelled to take common treasury notes in payment of debts, and as the prospect of ultimate redemption was remote and contingent, it is not too much to say that they must have depreciated in the market long before the war closed, as did the currency of the Confederate States. Making the notes legal tender gave them a new use and it needs no argument to show that the value of things is in proportion to the uses to which they may be applied.

Concluding, then, that the provision which made treasury notes a legal tender for the payment of all debts other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. It is not claimed that any express prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment. Here those who assert the unconstitutionality of the acts mainly rest their argument. They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress all other

powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary, it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive. * * *

To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court. So far from its containing a lurking prohibition, many have thought it was intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own, especially when considered in connection with the other clause which denies to the States the power to coin money, emit bills of credit, or make anything but gold or silver coin a tender in payment of debts. We do not assert this now, but there are some considerations touching upon these clauses which tend to show that if any implications are to be deduced from them, they are of an enlarging rather than a restraining character. *The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the Federal Government, while the same power as well as the power to emit bills of credit was withdrawn from the States. The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. * * ** And generally, when one of such powers was expressly denied to the States only, it was for the purpose of rendering the Federal power more complete and exclusive. Why then, it may be asked, if the design was to prohibit to the new government, as well as to the States, that general power over the currency, which the States had when the Constitution was framed was such denial not expressly extended to the new government as it was to the States? In view of this it might be argued with much force that when it is considered in what brief and comprehensive terms the Constitution speaks, how sensible its framers must have been that emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the government and the demands of the people—when it is remembered that paper money was almost exclusively in use in the States as the medium of exchange and when the great evil sought to be remedied was the want of uniformity in the current value of money, it might be argued, we say, that the gift of power to coin money and regulate the value thereof, was understood as conveying general power over the currency, the power which had belonged to the States, and

which they surrendered. Such a construction, it might be said, would be in close analogy to the mode of construing other substantive powers granted to Congress. They have never been construed literally, and the government could not exist if they were. Thus the power to carry on war is conferred by the power to "declare war." The whole system of the transportation of the mails is built upon the power to establish post offices and post roads. The power to regulate commerce extended far beyond the letter of the grant. Even the advocates of a strict literal construction of the phrase "to coin money and regulate the value thereof," while insisting that it defines the material to be coined as metal, are compelled to concede to Congress large discretion in all other particulars. The Constitution does not ordain what metals may be coined or prescribe that the legal value of the metals when coined shall correspond at all with their intrinsic value in the market. Nor does it even affirm that Congress may declare anything to be a legal tender for the payment of debts. Confessedly the power to regulate the value of money coined and of foreign coins is not exhausted by the first regulation. More than once in our history has the regulation been changed without any denial of the power of Congress to change it, and it seems to have been left to Congress to determine alike what metal shall be coined, its purity and how far its statutory value, as money, shall correspond from time to time with the market value of the same metal as bullion. How, then, can the grant of a power to coin money and regulate its value, made in terms so liberal and unrestrained, coupled also with a denial to the States of all power over the currency, be regarded as an implied prohibition to Congress against declaring treasury notes a legal tender, if such declaration is appropriate, and adapted to carrying into execution the admitted powers of the government.

We come next to the argument much used, and indeed the main reliance of those who assert the unconstitutionality of the Legal Tender Acts. It is that they are prohibited by the spirit of the Constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first Act was passed, and it has no bearing upon the question whether the Acts are valid when applied to contracts made after their passage. The argument assumes two things—first, that the Acts do, in effect, impair the obligation of contracts; and, second, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true that under the Acts a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It is not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract

was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract, respecting its fruits, nor the anticipation of the other constitutes its obligations. There is a well recognized distinction between the expectation of the parties to a contract and the duty imposed by it.

✓Nor can it be truly asserted that Congress may not, by its action indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a Bankrupt Act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or even in peace, pass Non-intercourse Acts, or direct an embargo. All such measures may and must operate seriously upon existing contracts and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then clear that the powers of Congress may be exerted, though the effect of such an exertion may be in one case to annul, and in other cases to impair the obligation of contracts. * * * *

Closely applied to the objection we have just been considering, is the argument pressed upon us that the Legal Tender Acts were prohibited by the spirit of the Fifth Amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft or a war, may inevitably bring upon individuals great losses; may indeed render valuable property almost valueless. They may destroy the worth of contracts. But who ever supposed that because of this a tariff could not be changed or a non-intercourse Act, or an embargo be enacted, or a war be declared? By the act of June 28th, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent. was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six per cent. less gold than was required to pay them before. The result was thus precisely what it is contended the Legal Tender Acts worked. But was it ever imagined that this was taking private property without compensation or without due process of law?

We are not aware of anything else which has been advanced in support of the proposition that the Legal Tender Acts were forbidden by either the letter or spirit of the Constitution. If, there-

fore, they were, what we have endeavored to show, appropriate means for legitimate ends, they were not transgressive of the authority vested in Congress. Here we might stop, but we will notice briefly an argument presented in support of the position that the unit of money value must possess intrinsic value. The argument is derived from assimilating the constitutional provision respecting a standard of weights and measures to that conferring the power to coin money and regulate its value. It is said there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a uniform standard of value which has itself no value? This is a question foreign to the subject before us. The Legal Tender Acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their mission is coinage or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is that Congress has power to enact that the Government's promises to pay money shall be for the time being equivalent in value to the representative of value determined by the coinage acts or to multiples thereof. It is hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension, but value is an ideal thing. The coinage Acts fix its unit as a dollar; but the gold or silver thing we call a dollar is in no sense a standard of a dollar. It is a representative of it. There might never have been a piece of money of the denomination of a dollar. There never was a pound sterling coined until 1815, if we except a few coins struck in the reign of Henry VIII, almost immediately debased, yet it has been the unit of British currency for many generations. It is, then, a mistake to regard the Legal Tender Acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value. * * * *

But, without extending our remarks further, it will be seen that we hold the Acts of Congress constitutional as applied to contracts made either before or after their passage. In so holding, we overrule so much of what was decided in *Hepburn v. Griswold*, 8 Wall, 603, as ruled the Acts unwarranted by the Constitution, so far as they apply to contracts made before their enactment. That case was decided by a divided court, and by a court having a less number of Judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. *Brisco v. Bank of Ky.*, 8 Pet., 118. We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we have made a mistake, we would hear another argu-

ment and correct our error. And it is no unprecedented thing in courts of last resort both in this country and in England to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it as our duty so to decide and to affirm both these judgments.

Note.—Mr. Justice Bradley filed an opinion concurring in that of the court and giving as his reason for voting in favor of the constitutionality of the Acts the fact that it was necessary to provide a proper currency for the country and especially in time of financial pressure and threatened collapse of commercial credit. Mr. Chief Justice Chase, and Justices Clifford and Field filed long dissenting opinions, in which Mr. Justice Nelson concurred. The gist of the dissenting opinions was that the court had decided the present questions in *Hepburn v. Griswold* and should adhere to the constitutional doctrines therein pronounced that gold and silver coin only could be legal tender without contract and against the will of the person to whom they are tendered.

Note.—The decision in the case of *Hepburn vs. Griswold* was announced on February 7, 1870; five Justices voting against and three Justices voting for the constitutionality of the Legal Tender Acts. Chief Justice Chase, Justices Nelson, Clifford, Greer and Field constituted the majority, and Justices Swayne, Davis and Miller the minority. On the facts of the case, the decision was applicable only to cases where the debt was in existence before the Legal Tender Acts were passed, yet the reasoning of the majority seemed to deny to Congress the power to make United States notes legal tender even for future debts. This decision, of course, caused great uneasiness to business men throughout the country. During President Johnson's administration an Act had been passed reducing the number of Judges of the Supreme Court from nine to seven for the purpose of depriving him of the right to fill vacancies which were about to occur. When *Hepburn vs. Griswold* was decided, there was one vacancy on the Supreme Court Bench, and one of the majority Judges had resigned, though his resignation did not take effect until after the decision was rendered. After President Grant's inauguration, the number of Supreme Court Judges was restored to nine, and on February 18, 1870, President Grant appointed William Strong, of Pennsylvania, to fill one of the vacancies, and on March 21, 1870, Joseph P. Bradley, of New Jersey, to fill the other.

In his work on Congressional Government, page 38, Woodrow Wilson, speaking of these appointments, says:

"In December, 1869, the Supreme Court decided against the constitutionality of Congress's pet Legal Tender Acts, and in the following March a vacancy on the Bench opportunely occurring, and a new Justiceship having been created to meet the emergency, the Senate gave the President to understand that no nominee unfavorable to the debated Acts would be confirmed, two Justices of the predominate party's way of thinking were appointed. The

"hostile majority of the Court was out-voted, and the obnoxious decision "reversed."

On May 1, 1871, the Court as reorganized announced the decision in *Knox v. Lee* reported above, upholding the Legal Tender Acts on the ground that they were reasonably necessary to carry on the war, and so justified under the power to make war. Mr. Justice Strong, one of the new appointees, wrote the prevailing opinion, and Mr. Justice Bradley, the other, wrote a concurring opinion. Chief Justice Chase, and Justices Nelson, Clifford and Field dissented from the decision. In 1878 Congress ordered a re-issue of the Legal Tender notes, and as the Act could no longer be justified as a war measure, its validity was again challenged, and it was finally upheld in the following case of *Juilliard vs. Greenman*.

JUILLIARD *v.* GREENMAN.

110 U. S., 421. 1883.

Juilliard, a citizen of New York, brought suit against Greeman, a citizen of Connecticut, to recover the sum of \$5,122.90 in payment of one hundred bales of cotton sold and delivered to Greenman, who admitted the purchase and delivery of the cotton, and the agreement to pay for them. Greenman stated that he had offered and tendered to Juilliard, in payment of the debt, \$22.50 in United States gold coin, forty cents in silver coin, and two United States notes, one of the denomination of \$5,000, and the other of the denomination of \$100. The two notes were known as United States legal tender notes. These notes were originally issued under the acts of Congress of 1862 and 1863, and reissued and kept in circulation under the act of Congress of May 31, 1878. The plaintiff had refused to take the notes, and contended that the defence was insufficient in law. The Circuit Court in New York gave judgment for Greenman. The case was appealed to the Supreme Court of the United States.

MR. JUSTICE GRAY delivered the opinion of the court.

The notes of the United States, tendered in payment of the defendant's debt to the plaintiff, were originally issued under the acts of Congress of February 25, 1862, ch. 33, July 11, 1862, ch. 142, and March 3, 1863, ch. 73, passed during the War of the Rebellion, and enacting that these notes should "be lawful money and a legal tender in payment of all debts, public and private, within the United States," except for duties on imports and interest on the public debt. 12 Stat. 345, 532, 709. * * * *

The act of May 31, 1878, ch. 146, under which the notes in question were reissued, is entitled "An Act to forbid the further retirement of United States legal tender notes," and enacts as follows:—

"From and after the passage of this act it shall not be lawful for the Secretary of the Treasury or other officer under him to cancel or retire any more of the United States legal tender notes. And when any of said notes may be redeemed or be received into the Treasury under any law from any source whatever and shall belong to the United States, they shall not be retired, cancelled, or destroyed, but they shall be reissued and paid out again and kept in circulation: Provided, That nothing herein shall prohibit the cancellation and destruction of mutilated notes and the issue of other notes of like denomination in their stead, as now provided by law. All acts and parts of acts in conflict herewith are hereby repealed." 20 Stat. 87.

The manifest intention of this act is that the notes which it directs after having been redeemed, to be reissued and kept in circulation shall retain their original quality of being a legal tender.

The single question, therefore, to be considered, and upon the answer to which the judgment to be rendered between these parties depends, is whether notes of the United States, issued in time of war, under acts of Congress, declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the Treasury, and then reissued under the act of 1878, can, under the Constitution of the United States, be a legal tender in payment of such debts.

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In *Veazie Bank v. Fenno*, 8 Wall. 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all State banks, or national banks, or private bankers, paying out the notes of individuals, or of State banks, a tax of ten per cent. upon the amount of such notes so paid out. *Veazie Bank v. Fenno*, above cited; *National Bank v. United States*, 101 U. S., 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender for foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts

to secure a sound and uniform currency for the country must be futile." 8 Wall. 549; 101 U. S., 6. * * *

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. *Austria v. Day*, 2 Giff. 628, and 3 D. F. & J. 217. This power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several colonies and States; and during the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. * * *

This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exer-

cise, that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several samples of this. * * * *

Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States."

It follows that the act of May 31, 1878, ch. 146, is constitutional and valid; and that the Circuit Court rightly held that the tender in treasury notes, reissued and kept in circulation under the act, was a tender and lawful money in payment of the defendant's debt to the plaintiff.

Judgment affirmed.

Note.—See also *Veazie Bank v. Fenno*, page 48.

Section 4.

THE WAR POWER OF CONGRESS.

2 BLACK. 635. 1862.

THE PRIZE CASES.

These case were brought to test the legality of the seizure of certain vessels found running the blockade of the Southern ports during the Civil War. (The details of the cases are omitted and only a portion of the opinion dealing with the war power of Congress is here cited.)

MR. JUSTICE GRIER delivered the opinion of the court.

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion of foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral*." Lord Stowell (1 Dodson, 247) observes: "It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13, 1846, which recognized "*a state of war as existing by the act of the Republic of Mexico*." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact.

Seizure of vessels was upheld.

Section 5.

THE POWER OF CONGRESS OVER THE TERRITORIES.

Sub-Section A.

THE INSULAR TARIFF CASES.

DE LIMA *v.* BIDWELL.

182 U. S., 1. 1900.

This was an action in the Supreme Court of New York State by the firm of De Lima & Co., against the collector of the port of New York, G. R. Bidwell, to recover duties paid under protest upon certain importations of sugar from San Juan, Porto Rico, during the autumn of 1899, and subsequent to the cession of the island to the United States. (The Foraker Act of April 12, 1900, had not been passed when these goods were brought into New York). The case was removed to the Circuit Court of the United States, which decided in favor of the collector of the port and against De Lima & Co.'s right to recover the duties. De Lima & Co. then appealed the case to the Supreme Court of the United States, and claimed that the tariff duties could only be collected on goods coming from a foreign country and that Porto Rico since the Spanish-American war was no longer a foreign country.

MR. JUSTICE BROWN delivered the opinion of the court.

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws. * * * *

By Article II, section 2, of the Constitution, the President is given power, "by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the senators present concur;" and by Art. VI, "this Constitution and the laws of the United States, which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land." It will be observed that no distinction is made as to the question of supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two-thirds of the senators present, but each of them is the supreme law of the land.

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the excep-

tion, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party. It was said by Chief Justice Marshall in *American Ins. Co. v. Canter*, 1 Pet. 511, 542; "The Constitution confers absolutely upon the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty." The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an Act of Congress.

It follows from this that by a ratification of the treaty of Paris the island became territory of the United States—although not an organized territory in the technical sense of the word. * * * *

But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. That was stated by Chief Justice Taney in the *Dred Scott* case. In the more recent case of *National Bank v. County of Yankton*, 101 U. S., 129, it was said by Mr. Chief Justice Waite that Congress "has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people under the Constitution of the United States, may do for the States." * * * * In short, when once acquired by treaty, it (the territory) belongs to the United States, and is subject to the disposition of Congress.

Territory thus acquired can remain a foreign country under the tariff laws only upon one of two theories; either that the word "foreign" applies to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the States. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. Thus, a statute forbidding the sale of liquors to minors applies not only to minors in existence at the time the statute was enacted, but to all who are subsequently born; and ceases to apply to such as thereafter reach their majority. So, when the Constitution of the United States declares in Art. I, Sec. 10, that the States shall not do certain things, this declaration operates not only upon the thirteen original States, but upon all who subsequently become such; and when Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such territory is admitted as a State. By parity of reasoning a country ceases to be foreign the instant it becomes domestic. So, too, if Congress saw fit to cede one of its newly acquired territories (even assuming that it had the right to do so) to a foreign power, there could be no doubt that from the day of

such cession and the delivery of possession, such territory would become a foreign country, and be reinstated as such under the tariff laws. Certainly no act of Congress would be necessary in such case to declare that the laws of the United States had ceased to apply to it.

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the Customs Union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. We express no opinion as to whether Congress is bound to appropriate the money to pay for it. This has been much discussed by writers upon constitutional law, but it is not necessary to consider it in this case, as Congress made prompt appropriation of the money stipulated in the treaty. This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as a matter of law we deem to be judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the non-action of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words.

If an Act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself, what is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient. Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not. Will acts making appropriations for its postal service, for the establishment of lighthouses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient, if the contention of the government be sound, since acts embracing all these provisions have been passed in connection with

Porto Rico, and it insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic.

We are therefore of the opinion that at the time these duties were levied Porto Rico was not a foreign country, within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted and that the plaintiffs are entitled to recover them.

The judgment of the Circuit Court is therefore *Reversed*.

NOTE. Five justices concurred in the majority opinion. Three justices dissented upon the ground that as the custom laws of the United States had not as yet been applied by Congress to Porto Rico, that such island was still foreign within the meaning of the Dingley Tariff act. Justice Gray dissented upon the ground that the majority opinion was irreconcilable with the opinion of the majority of the court in *Downes v. Bidwell*.

DOWNES *v.* BIDWELL.

182 U. S., 244. 1900.

This was an action begun in the Circuit Court of the United States for the southern district of New York, by Downes, against the collector of the port of New York, Bidwell, to recover duties paid under protest upon certain oranges consigned to Downes in New York and brought thither from San Juan, Porto Rico, in November, 1900, after the passage of the Act of Congress taking effect May 1, 1900, and known as the Foraker act, which provided for a civil government and revenues for the island of Porto Rico and required that the payment of 15 per cent. of the duty levied on like articles from foreign countries should be collected on goods coming from Porto Rico. The Circuit Court decided in favor of the collector of the port of New York and against Downes' right to recover the duties, whereupon Downes appealed to the United States Supreme Court.

MR. JUSTICE BROWN announced the conclusion and judgment of the court. * * * *

In the case of *De Lima v. Bidwell*, just decided, we held that upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the *United States* within that provision of the Constitution which declares that "all duties, imposts and exercises shall be uniform throughout the United States." (Art. I, Sec. 8.) If Porto Rico be a

part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by Sec. 9 "vessels bound to or from one State" cannot "be obliged to enter, clear, or pay duties in another."

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress and in the decisions of this court. * * * *

To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only "throughout the United States" or among the several States. * * * *

Upon the other hand, when the Constitution declares that all duties shall be uniform "throughout the United States," it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the "United States," by which term we understand the *States* whose people *united* to form the Constitution, and such as have been since admitted to the Union upon an equality with them. Not only did the people in adopting the Thirteenth Amendment thus recognize a distinction between the United States and "any place subject to their jurisdiction," but Congress itself, in the Act of March 27, 1804, providing for the proof of public records, applied the provisions of the act not only to "every court and office within the United States," but to the "courts and offices of the respective territories of the United States and countries subject to the jurisdiction of the United States," as to the courts and offices of the several States.

Unless these words are to be rejected as meaningless, we must treat them as a recognition by Congress of the fact that there may be territories subject to the jurisdiction of the United States, which are not of the United States.

In determining the meaning of the words of Article I, Section 6, "uniform throughout the United States," we are bound to consider not only the provisions forbidding preference being given to the ports of one State over those of another (to which attention has already been called), but the other clauses declaring that no tax or duty shall be laid on articles exported from any State, and that no State shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the States which united in forming the Constitution from discriminations by Congress, which would operate un-

fairly or injuriously upon some States and not equally upon others. The opinion of Mr. Justice White in *Knowlton v. Moore* (178 U. S. 41) contains an elaborate historical review of the proceedings in the convention, which resulted in the adoption of these different clauses and their arrangement, and he there comes to the conclusion (p. 105) that "although the provision as to preference between ports and that regarding uniformity of duties, imposts and excises were one in purpose, one in their adoption," they were originally placed together, and "became separate only in arranging the Constitution for the purpose of style." Thus construed together, the purpose is irresistible that the words "throughout the United States" are indistinguishable from the words "among or between the several States," and that these prohibitions were intended to apply only to commerce between ports of the several States as they then existed or should thereafter be admitted to the Union.

Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct. * * * *

We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States shall receive its inhabitants and what their status shall be in what Chief Justice Marshall termed the "American Empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their *status*, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that "the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible * * * to the enjoyment of all the rights, advantages and immunities of citizens of the United States;" in the case of Mexico, that they should "be incorporated into the Union, and be admitted at the proper time (to be judged of by the Congress of the United States), to the enjoyment of all the rights of citizens of the United States;" in the case of Alaska, that the inhabitants who remained three years, "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc.; and in the case of Porto Rico and the Philippines, "that the civil rights and political status of the native inhabitants * * * shall be determined by Congress." In all these cases there is an implied denial of the right of the inhabitants

to American citizenship until Congress by further action shall signify its assent thereto. * * * *

We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the Circuit Court is therefore *Affirmed.*

NOTE. There were a number of separate opinions delivered by the justices. Those who concurred in the majority judgment came to the same conclusion of Mr. Justice Brown, but by a different line of reasoning. For example, Justices White, Shiras and McKenna held that until Congress has formally incorporated the territory into the United States, the various provisions of the Constitution are inapplicable thereto, as otherwise, so far as fiscal matters are concerned, the action of the treaty making power could override the will of Congress.

The four justices who dissented held that uniformity of taxation means geographical uniformity throughout the United States and that the phrase "the United States" includes the territories as well as the States.

DOOLEY *v.* UNITED STATES.

183 U. S., 151. 1901.

The Foraker Act required that all merchandise going into Porto Rico from the United States should be subject to a duty of 15 per cent of the amount of duties paid upon similar merchandise imported from foreign countries. Dooley, Smith and Company imported certain merchandise into Porto Rico from New York. They paid the duties under protest and brought suit in the Circuit Court to recover them back on the ground that the Foraker Act was unconstitutional, being repugnant to the clause in the Constitution declaring "no tax or duty shall be laid on articles exported from any State." The Circuit Court decided that the duties were properly collected, whereupon Dooley, Smith and Company appealed the case to the United States Supreme Court.

MR. JUSTICE BROWN delivered the opinion of the court.

While the words "import" and "export" are sometimes used to denote goods passing from one State to another, the word "import," in connection with the provision of the Constitution that "no State shall levy any imposts or duties on imports or exports," was held in *Woodruff v. Parkham*, 8 Wall, 123, to apply only to articles imported from foreign countries into the United States. * * * *

In discussing this question, and particularly of the power of Congress to levy and collect taxes, duties, imposts, and excises, Mr. Justice Miller observed: "Is the word 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State to another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not at the same time exported from the former. But if we give to the word 'imposts' as used in the first mentioned clause, the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries the power and its limitations concerning imports."

It follows, and is the logical sequence of the case of *Woodruff v. Parkham*, that the word "export" should be given a correlative meaning and applied only to goods exported to a foreign country. *Muller v. Baldwin*, L. R. 9 Q. B. 457. If, then, Porto Rico be no longer a foreign country under the Dingley Act, as was held by a majority of this court in *De Lima v. Bidwell*, 182 U. S. 1, and *Dooley v. United States*, 182 U. S. 222, we find it impossible to say that goods carried from New York to Porto Rico can be considered as "exported" from New York within the meaning of that clause of the Constitution. If they are neither exports nor imports, they are still liable to be taxed by Congress under the ample and comprehensive authority conferred by the Constitution "to lay and collect taxes, duties, imposts and excises." Art. 1, sec. 8. * * * *

These duties were properly collected, and the action of the Circuit Court in sustaining the demurrer to the complaint was correct, and it is therefore *Affirmed.*

Sub-Section B.

THE EXTENSION OF THE CONSTITUTION TO THE TERRITORIES.

MORMON CHURCH *v.* UNITED STATES.

136 U. S., 1. 1890.

By virtue of an express reservation in the organic act of the Territory of Utah of the power to disapprove and annul the acts of its legislature, Congress on February 19th, 1887, repealed the act of incorporation of the Church of Jesus Christ of Later Day

Saints (The Mormon Church), for the reason that one of the principal objects of the Mormon Church was the promotion and practice of polygamy, which was prohibited by the laws of the United States.

In a proceeding under the Act of February 19, 1887, the Supreme Court of the Territory of Utah decreed that the Corporation of the Church of Christ of Later Day Saints was dissolved, whereupon the Church appealed to the Supreme Court of the United States, contending that Congress had no power to pass the Act of 1887.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the Territories and over the acts of the territorial legislatures established therein is generally expressly reserved in the organic acts establishing governments in said Territories. This is true of the Territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved September 9, 1850, it is declared that the legislative powers of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. * * * * All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect. 9 Stat. 454.

The decree of the Supreme Court of Utah is affirmed.

HAWAII v. MANKICHI.

190 U. S., 197. 1903.

This was a petition by Mankichi for a writ of *habeas corpus* to obtain his release from the Oahu convict prison, in Hawaii, where he was confined upon conviction for manslaughter. He alleged a violation of the Constitution in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict. In support of his contention, Mankichi cited the Newlands Resolution of July 7, 1898, annexing Hawaii, which provided that, "The municipal legislation of the Hawaiian Islands, not contrary to the Constitution of the United States, shall remain in force until the Congress of the United States shall otherwise determine." Man-

kichi's conviction was in accord with the municipal law of Hawaii, but he claimed this law violated Article V of the Amendments to the Constitution, which provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and Article VI of the Amendments, which provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The Supreme Court has interpreted this clause in regard to a jury trial to mean a trial by a common law jury of twelve men who shall render an unanimous verdict. From an order of the United States District Court discharging the prisoner the Attorney-General of the Territory appealed to the Supreme Court of the United States.

MR. JUSTICE BROWN delivered the opinion of the court.

If the negative words of the resolution, "nor contrary to the Constitution of the United States," be construed as imposing upon the islands, every provision of the Constitution, which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making preparations. * * * *

It is not intended here to decide that the words "nor contrary to the Constitution of the United States," are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing conditions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would the municipal status of Hawaii, allowing a conviction of treason on circumstantial evidence, or the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public

use without compensation, remain in force after the annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would go even farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.

The decree of the District Court for the Territory of Hawaii must be reversed, and the case remanded to that court with instructions to dismiss the petition.

Note.—In *Rassmusen v. U. S.*, 197 U. S. 516, the Supreme Court held that trial by jury is a constitutional incident to judicial procedure in Alaska because under the terms of the treaty and by subsequent act of Congress Alaska has been incorporated into the United States.

GONZALES *v.* WILLIAMS.

192 U. S., 1. 1904.

This was an appeal by Isabella Gonzales from an order of the Circuit Court of the United States for the Southern District of New York, dismissing a writ of *habeas corpus* issued on her behalf, to secure her release from the custody of the United States Commissioner of Immigration at the port of New York. It appeared that Isabella Gonzales, an unmarried woman, was born and resided in Porto Rico, and was an inhabitant thereof on April 11, 1899, the date of the proclamation of the treaty of Paris; she arrived at the port of New York from Porto Rico, August 24, 1902, when she was prevented from landing and detained as "an alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge. If she was not an alien immigrant within the intent and meaning of the Act of Congress (Act March 3, 1891, relative to immigration) the commissioner had no power to detain or deport her.

MR. CHIEF JUSTICE FULLER delivered the opinion.

* * * * The treaty ceding Porto Rico to the United States was ratified by the Senate, February 6, 1899; Congress passed an act to carry out its obligations March 2, 1899; and the ratifications were exchanged and the treaty proclaimed April 11, 1899. Then followed an act entitled "An act temporarily to provide remedies

and civil government for Porto Rico, and for other purposes," approved April 12, 1900. * * * *

By section 7 the inhabitants of Porto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsula who had not elected to preserve their allegiance to the Spanish Crown, were to be deemed citizens of Porto Rico, and they and citizens of the United States residing in Porto Rico were constituted a body politic under the name of the People of Porto Rico. Gonzales was a native inhabitant of Porto Rico and a Spanish subject, though not of the Peninsula, when the cession transferred her allegiance to the United States, and she was a citizen of Porto Rico under the act. And there was nothing expressed in the act, nor reasonably to be implied therefrom to indicate the intention of Congress that citizens of Porto Rico should be considered as aliens and the right of free access denied to them. Counsel for the government contends that the test of Gonzales' rights was citizenship of the United States, and not alienage. We do not think so, and on the contrary, are of opinion that if Gonzales was not an alien within the act of 1891, the order below was erroneous, * * * * We cannot concede, in view of the language of the treaty and of the act of April 12, 1900, that the word "alien" so used in the act of 1891, embraces the citizens of Porto Rico. We are not required to discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degatau, in his excellent argument as *amicus curiae*, that a citizen of Porto Rico, under the Act of 1900 is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the Act of 1891. * * * *

Final order reversed and cause remanded with a direction to discharge Gonzales.

Section 6

THE IMPLIED POWERS OF CONGRESS.

Sub-Section A.

THE EXCLUSION OF FOREIGNERS.

THE CHINESE EXCLUSION CASE.

CHAE CHANG PING *v.* UNITED STATES.

130 U. S., 581. 1889.

The facts are sufficiently stated in the opinion of the court.

MR. CHIEF JUSTICE FIELD delivered the opinion of the court.

The appellant, Chae Chang Ping, was a subject of the Emperor of China and a laborer by occupation. He resided at San Francisco, California, following his occupation, from some time in 1875 until June 2, 1887, when he left for China on the steamship "Gaelic," having in his possession a certificate, in terms entitling him to return to the United States, bearing date on that day, duly issued to him by the Collector of Customs of the port of San Francisco, pursuant to the provisions of section four of the restriction act of May 6, 1882, as amended by the Act of July 5, 1884.

On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steamship "Belgic," which arrived within the port of San Francisco on the 8th of October following. On his arrival he presented to the proper custom-house officer his certificate and demanded permission to land, the Collector of the port refused the permit, solely on the ground that under the Act of Congress, approved October 1, 1888, supplementary to the restriction acts of 1882 and 1884, the certificate had been annulled and his right to land abrogated, and he had been thereby forbidden again to enter the United States. The captain of the steamship, therefore, detained the appellant on board the steamer. Thereupon a petition on his behalf was presented to the Circuit Court of the United States for the Northern District of California, alleging that he was unlawfully restrained of his liberty, and praying that a writ of *habeas corpus* might be issued directed to the master of the steamship, commanding him to have the appellant, with the cause of his detention, before the court for a hearing. Upon the hearing which followed, the court held that the appellant was not entitled to enter the United States, and was not

Note.—See Appendix for the Immigration Law of the United States.

unlawfully restrained of his liberty, and ordered that he be remanded to the custody of the master of the steamship from which he had been taken under the writ. From this order an appeal was taken to this court.

The appeal involves a consideration of the validity of the Act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884, granting them permission to return. The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress. * * * *

There being nothing in the treaties between China and the United States to impair the validity of the Act of Congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it? If so, it must be because it was not within the power of Congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. * * * *

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to

the political department of our government, which is alone competent to act upon the subject. The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. * * * * *

Order affirmed.

Sub-Section B.

THE RIGHT OF EMINENT DOMAIN.

KOHL v. UNITED STATES.

91 U. S., 367. 1875.

Congress by act of March 2, 1872, authorized the Secretary of the Treasury to purchase in the City of Cincinnati a suitable site for a building for the accommodation of the United States post office and for other public purposes, and by a subsequent act made an appropriation "for the purchase at private sale or by condemnation of such site." Pursuant to this act a proceeding was instituted in the Circuit Court by the United States to appropriate a certain parcel of land in the city of Cincinnati as a site for a post office. The owners of the property sought to be appropriated moved to dismiss the proceeding on the ground that Congress did not under the Constitution have the right of eminent domain. The Circuit Court gave judgment for the United States. An appeal was taken to the United States Supreme Court.

MR. JUSTICE STRONG delivered the opinion of the court.

It has not been seriously contended during the argument that the United States Government is without power to appropriate lands or other property within the States for its own use, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal

government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it, but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Albeman v. Booth*, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken? * * * *

It is true, this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not

disprove its existence. In some instances, the States, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. * * * * The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

The judgment of the lower court is affirmed.

Sub-Section C.

THE POWER TO MAKE ALL LAWS NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE ENUMERATED POWERS.

McCulloch v. Maryland. See page 50.

Gibbons v. Ogden. See page 72.

Julliard v. Greenman. See page 232.

Section 7.

RESTRICTIONS ON THE POWERS OF CONGRESS.

Sub-Section A.

THE BILL OF RIGHTS.

BARRON *v.* BALTIMORE.

7 PET. 243. 1833.

Barron brought suit against the City of Baltimore to recover damages for injuries to certain wharf property owned by him in Baltimore. The value of his deep water wharf had been destroyed by a sand bar created in front it, in consequence of a change of water currents in the harbor. It appeared that the City of Balti-

more in the exercise of its corporate authority over paving and grading of streets and over the health of its inhabitants had diverted certain streams of water from their natural and accustomed course and caused them to flow into the harbor in such a way as to deposit sand in front of Barron's wharf. Barron could get no redress in the State courts and took an appeal to the Federal courts, carrying his case to the Supreme Court of the United States, alleging a violation of Article V of the amendments to the Constitution of the United States, which declares that "private property shall not be taken for public use without just compensation."

MARSHALL, C. J., delivered the opinion of the court.

* * * * The Constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States. Each State established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the 5th amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the 10th section of the 1st article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power, by the departments of the general government. Some of them use language applicable to Congress; others are expressed in general terms. The 3d clause, for example, declares that "no bill of

attainder or *ex post facto* law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or *ex post facto* law." This provision, then, of the 9th section, however comprehensive its language, contains no restriction on State legislation.

The 9th section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the 10th proceeds to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," etc. Perceiving that in a Constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms; the restrictions contained in the 10th section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the general government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the 9th and 10th sections of the 1st article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the States; if in every inhibition intended to act on State power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress, and the assent of three-fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot apply them.

We are of opinion that the provision in the fifth amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion, that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

Sub-Section B.

MEANING OF EX-POST-FACTO LAWS.

CALDER v. BULL.

3 DALLAS, 386. 1798.

One Morrison made a will in 1779, giving certain lands in Connecticut to the wife of Bull. The will was offered for probate in 1793, but probate was refused, and the wife of Calder, as Morrison's heiress at law, was held to be entitled to the property. Under the statute law of Connecticut at that time no appeal could be taken from the decree of the probate court after eighteen months had elapsed from the date of the decree. In 1795, more than two years after the decree refusing probate of Morrison's will had been entered, the State legislature passed an act setting aside the decree of the probate court and granting a new hearing in the matter of Morrison's will. The rehearing was subsequently held, the will was admitted to probate and the wife of Bull, as devisee, was declared entitled to the property. The Supreme Court of Errors of Connecticut found that there was no error in the decree of the probate court at the rehearing. Mrs. Calder then claimed that Mrs. Bull's right was barred by the lapse of eighteen months from the date of the decree refusing probate; that the subsequent statute providing for the rehearing was an *ex post facto* law and therefore unconstitutional, under Art. 1, Sec. 10 of the Constitution, which provides that no State shall pass any *ex post facto* law.

Appeal was taken to the United States Supreme Court.

MR. JUSTICE CHASE delivered the following opinion:

* * * * The Constitution of the United States, Art. I, § 9, prohibits the legislature of the United States from passing any *ex post facto* law; and in Sec. 10 lays several restrictions on the authority of the legislatures of the several States; and among them, "that no State shall pass any *ex post facto* law."

I shall endeavor to show what law is to be considered an *ex post facto* law, within the words and meaning of the prohibition in the Federal Constitution. The prohibition, "that no State shall pass any *ex post facto* law," necessarily requires some explanation; for naked and without explanation it is unintelligible, and means nothing. Literally, it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed. * * * *

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd.

Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to execute acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making of innocent action criminal, and punishing it as a crime. The expressions "*ex post facto* laws," are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by legislators, lawyers, and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an *ex post facto* law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Woodeson, and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

(The other judges of the court delivered opinions and the decree of the Supreme Court of Errors of Connecticut was affirmed, all concurring.)

Note.—See also case of *Ex parte Garland*, page 37.

CHAPTER III.

The Judicial Department

Section 1.

THE JURISDICTION OF THE SUPREME COURT.

Sub-Section A.

SUITS BETWEEN STATES.NEW HAMPSHIRE *v.* LOUISIANA.NEW YORK *v.* LOUISIANA.

108 U. S., 76. 1883.

On the 18th of July, 1879, the Legislature of New Hampshire passed a statute which provided that whenever a citizen of the State should own a claim against another State of the United States, arising upon a written obligation to pay money which should be past due and unpaid, that such citizen could assign the claim to the State, and the Attorney-General of the State should institute a proceeding in the name of the State in the Supreme Court of the United States to recover the amount due. Under this act, certain bonds of the State of Louisiana were assigned to the State of New Hampshire by one of its citizens for the purpose of suit as contemplated in the act. A similar statute in New York, passed May 15, 1880, was the basis for a suit upon bonds of the same character, assigned to the State of New York by one of its citizens. The two cases were heard together.

MR. CHIEF JUSTICE WAITE delivered the opinion.

The first question we have to settle is whether, upon the facts shown, these suits can be maintained in this court.

Art. III, Sec. 2, of the Constitution provides that the judicial power of the United States shall extend to "controversies between two or more States," and "between a State and a citizen of another State." By the same article and section it is also provided that in cases "in which a State shall be a party, the Supreme Court shall have original jurisdiction." By the Judiciary Act of 1789, c. 20, Sec. 13, 1 Stat. 80, the Supreme Court was given "exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a

Note.—See Appendix for digest of the new Federal Judicial Code, showing the organization and jurisdiction of the various federal courts.

State and citizens of another State, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

Such being the condition of the law, Alexander Chisholm, as executor of Robert Farquar, commenced an action of assumpsit in this court against the State of Georgia, and process was served on the Governor and Attorney-General. *Chisholm v. Georgia*, 2 Dall, 419. On the 11th of August, 1792, after the process was thus served, Mr. Randolph, the Attorney-General of the United States, as counsel for the plaintiff, moved for a judgment by default on the fourth day of the next term, unless the State should then, after notice, show cause to the contrary. At the next term Mr. Ingersoll and Mr. Dallas presented a written remonstrance and protestation on behalf of the State against the exercise of jurisdiction, but in consequence of positive instructions they declined to argue the question. Mr. Randolph, thereupon, proceeded alone, and in opening his argument said, "I did not want the remonstrance of Georgia, to satisfy me that the motion which I have made is unpopular. Before the remonstrance was read, I had learnt from the facts of another State, whose will must always be dear to me, that she too condemned it."

On the 19th of February, 1793, the judgment of the court was announced, and the jurisdiction sustained, four of the justices being in favor of granting the motion and one against it. All the justices who heard the case filed opinions, some of which were very elaborate, and it is evident the subject received the most careful consideration. * * * *

Prior to this decision the public discussion had been confined to the power of the court, under the Constitution, to entertain a suit in favor of a citizen against a State; many of the leading members of the convention arguing, with great force, against it. As soon as the decision was announced, steps were taken to obtain an amendment of the Constitution withdrawing jurisdiction. About the time the judgment was rendered, another suit was begun against Massachusetts, and process served on John Hancock, the Governor. This led to the convening of the general court of that Commonwealth, which passed resolutions instructing the Senators and requesting the members of the House of Representatives from the State "to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States." Other States also took active measures in the same direction, and soon after the next Congress came together the Eleventh Amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States, so as to go into effect on the 8th of January, 1798. That amendment is as follows:—

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

against one of the United States by citizens of another State, or by citizens and subjects of any foreign State."

Under the operation of this amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded from prosecuting these suits in their own names. The real question, therefore, is whether they can sue in the name of their respective States, after getting the consent of the State, or, to put it in another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens?

The language of the amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted by citizens of one State against another State. No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons. In New Hampshire, before the Attorney-General is authorized to begin a suit, the owner of the bonds must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the State can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the Attorney-General such counsel as he chooses, the State being in no way responsible for fees. All moneys collected are to be kept by the Attorney-General, as special trustee, separate and apart from the other moneys of the State, and paid over by him to the owner of the claim, after deducting all expenses although signed by the Attorney-General, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bondholders in Louisiana, and its is manifested in many ways that both the State and the Attorney-General are only nominal actors in the proceeding. The bond owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the State.

In New York no special provision is made for compromise or the employment of additional counsel, but the bondholder is required to secure and pay all expenses and gets all the money that is recovered. This State, as well as New Hampshire, is nothing more or less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them. * * * *

It follows that when the amend (eleventh amendment) took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power taken away by the grant of the special remedy was restored by the amendment. The effect of the amendment was simply to revoke the new

right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the Chisholm case, there is not even an intimation that if the citizen could not sue, his State could sue for him. The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued; and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and

The bill in each of the cases is consequently dismissed.

Sub-Section B.

SUITS BETWEEN THE UNITED STATES AND A STATE.

UNITED STATES *v.* TEXAS.

143 U. S., 621. 1892.

This was an original suit brought in the Supreme Court of the United States by the Attorney-General on behalf of the United States against the State of Texas. The Act of May 2, 1890, which provided a temporary government for the Territory of Oklahoma directed such a suit to be brought to establish the title of the United States to the country lying between the North and South Forks of the Red River, where the Indian Territory and the State of Texas adjoin. The government alleged that the State of Texas had without right taken possession of the disputed territory in violation of the rights of the United States over that land, as constituting a part of the territory of Oklahoma. The State of Texas made an appearance to the action, but questioned the right of the Federal government to bring a suit against a State of the Union in one of its own courts.

MR. JUSTICE HARLAN delivered the opinion of the court.

(The court first passed upon the question of whether a dispute as to boundary line between States or Territories was a political or judicial question and concluded: "It cannot with propriety be said that a question of boundary between a Territory of the United States and one of the States of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such controversy.")

The important question therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought

by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. * * *

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States v. North Carolina*, 136 U. S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The Constitution extends the judicial power of the United States "to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases, affecting ambassadors or other public ministers and consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." Art. 3, § 2. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 11th Amendment.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the

other, on the character of the parties, whatever may be the subject of controversy. *Cohens v. Virginia*, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws, and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends. * * *

We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State. * * *

The question as to the suability of one government by another government rests wholly upon different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch v. State of Maryland*, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws, and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be a party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a

suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States. * * * *

(The court overruled the objection that a State could not be sued by the Federal Government.)

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

Mr. Justice Lamar and myself are unable to concur in the decision just announced.

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State," and "between a State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.

Section 2.

SUITS AGAINST A STATE BY ONE OF ITS OWN CITIZENS.

HANS v. LOUISIANA.

134 U. S., 1. 1890.

This suit was brought in the Circuit Court of the United States in Louisiana by Bernard Hans, a citizen of Louisiana, against the State of Louisiana to recover the amount of certain coupons, annexed to bonds issued by the State. The plaintiff Hans contended that he, being a citizen of Louisiana, could maintain suit against the State, as the 11th Amendment of the Constitution prohibited only suits against a State which were brought by citizens of another State, or by citizens or subjects of a foreign State. Hans asserted

that it was a violation of the Constitution for a State "to impair the obligation of its own contract by refusing to pay its bonds." The State appeared and excepted to the suit on the ground that a State could not be sued without its permission, and asked that the case be dismissed.

MR. JUSTICE BRADLEY delivered the opinion of the court.

* * * * The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the Federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the Circuit Court, which, as found in the act of March 3, 1875, is as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws, or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own citizens is not embraced within it; but it is contended that though jurisdiction does not exist on the ground, it nevertheless does exist if the case itself is one which necessarily involves a Federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

That a State cannot be sued by a citizen of another State, or of a foreign State, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana v. Jumel*, 107 U. S. 711. This was a case arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief

was sought against State officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacles of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read; and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the Federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States or of a foreign State; and may be thus sued in the Federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the Judiciary Act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm v. Georgia*, 2 Dall, 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to impart any power to authorize the bringing of such suits. * * * *

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained. * * * *

Undoubtedly a State may be sued by its own consent, as was the

case in *Curran v. Arkansas*, 15 How. 304, 309, and in *Clark v. Barnard*, 108 U. S. 436, 447. The suit in the former case was prosecuted by virtue of a State law which the legislature passed in conformity to the constitution of the State. But this court decided, in *Beers v. Arkansas*, 20 How. 527, that the State could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of State laws impairing the obligation of a contract. * * * *

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its policy and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

Affirmed.

Note.—See also *New Hampshire v. Louisiana*, page 259.

Section 3.

THE LAW ADMINISTERED BY THE FEDERAL COURTS.

SWIFT *v.* TYSON.

16 PETERS, 1. 1842.

Suit was instituted in the Circuit Court of the United States by Swift, as indorsee of a bill of exchange, dated at Portland, Maine, on May 1st, 1836, and accepted by Tyson in New York City. It was claimed by Tyson that the consideration for the bill was a pre-existing debt, that such a consideration was not a valid one under the law of New York, that the acceptance having been made in New York the contract was to be considered as a New York contract, and therefore governed by the laws of that State, which laws were obligatory upon the Federal court.

MR. JUSTICE STORY delivered the opinion of the court.

* * * * In the present case, the plaintiff is a *bona fide* holder without notice for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in

the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles, as by the express provisions of the 34th section of the Judiciary Act of 1789, c. 20. And then it is further contended that, by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments. * * * *

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law.* It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did not apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent opera-

tion, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world. * * * *

This question has been several times before this court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt, for which the negotiable instrument is transferred to him, is a pre-existing debt or is contracted at the time of the transfer. In each case, he equally gives credit to the instrument. The case of *Coolidge v. Payson*, 2 Wheat. 66, 70, 73, and *Townsley v. Sumrall*, 2 Pet. 170, 182, are directly in point.

We are all, therefore, of opinion that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.

Section 4.

POWER OF THE COURTS TO DECLARE AN ACT OF THE LEGISLATURE NULL AND VOID.

1. As to Acts of Congress.
Marbury v. Madison, page 23.
Hepburn v. Griswold, page 221.
Pollock v. Farmers' Loan and Trust Company, page 57.
2. As to Acts of State Legislature.
M'Culloch v. Maryland, page 50.
Gibbons v. Ogden, page 72.
Brown v. Maryland, page 166.

CHAPTER IV.

Constitutional Guarantees**Section 1.****TRIAL BY JURY.****EX PARTE MILLIGAN.**

4 WALLACE, 2. 1866.

On the 10th day of May, 1869, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana in which he prayed that he be discharged from an alleged unlawful imprisonment. The facts of the case were as follows: Milligan was a citizen of the United States and a resident for twenty years of the State of Indiana. He was not, nor ever had been, in the military or naval service of the United States. While at his home, on the 5th day of October, 1864, he was arrested by order of General Hovey, commanding the military district of Indiana, and confined in a military prison near Indianapolis. On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, was tried on the charge of conspiracy against the Government of the United States, affording aid and comfort to rebels against the authority of the United States, and other charges. He was found guilty and sentenced to be hanged. The sentence was approved by the President of the United States. On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a jury, who were charged to inquire whether the laws of the United States had been violated. The court adjourned January 27, 1865, and discharged the jury from further service. No bill of indictment or presentment was found against Milligan, for any offense whatever by the grand jury for Indiana. Milligan insisted that the military commission had no jurisdiction to try him, that he had not been a citizen of any of the States arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

MR. JUSTICE DAVIS delivered the opinion of the court.

* * * The discipline necessary to the efficiency of the army and navy requires other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of a trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of State or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive the watchful care of those intrusted with the guardianship of the Constitution and laws. It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this; that in a time of war the commander of an armed force * * * has the power, within the lines of his military district to suspend all civil rights and their remedies, and subject citizens as well as soldiers, to the rule of his will, and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of each one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance, for, if true, republican government is a failure, and there is an end of liberty regulated by law * * *

Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish. * * *

The necessities of the service, during the late Rebellion, required that the loyal States should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality,

where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as well as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

The prisoner was discharged

See also *Hawaii v. Mankichi*, page 245.

Section 2.

CIVIL RIGHTS.

CIVIL RIGHTS CASES.

109 U. S., 3. 1883.

The Act of Congress of March 1, 1875, known as the Civil Rights Act, made it a criminal offense for any person to deny any citizen on account of race or color the full and equal enjoyment of the privileges and accommodations of inns, public conveyances, theatres, and other places of public amusement. Certain persons were indicted for violations of this act, and carried these cases to the Supreme Court of the United States in order to test the constitutionality of this act, their contention being that, as the Constitution and its Amendments do not authorize Congress to regulate private rights, the indictments under the act of 1875 were void. The government contended that the act was authorized by the 1st section of the Fourteenth Amendment, which declares, "No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MR. JUSTICE BRADLEY, speaking in reference to the 1st section of the Fourteenth Amendment, says:

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of

the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal laws for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicted upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.

In the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore

provide due process of law for their vindication in every case; and that, because the denial by a State to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking.

(The court comes to the conclusion that the act in question is not directed against any particular State action, and therefore is not within the power conferred on Congress by the amendment.)

Section 3.

STATE LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

Article I, Section 10, of the Constitution of the United States provides "That no State shall pass any law impairing the obligation of contracts."

DARTMOUTH COLLEGE *v.* WOODWARD.

4 WHEATON, 518. 1819.

Dartmouth College in New Hampshire had a charter granted by the British crown in 1769, by which twelve persons were incorporated as trustees and granted appropriate privileges and powers to conduct the affairs of the college, with authority to fill all vacancies in their own body. In 1816 the New Hampshire Legislature attempted to alter this charter by increasing the number of trustees, the additional members to be appointed by the governor, and placed the more important acts of the trustees under the control of a board of overseers. The trustees acting under the old charter brought an action of trover against Woodward, who was secretary of the body, claiming to act under the State law, for the recovery of certain of the college records and documents. The question to be decided was whether the statutes of New Hampshire were invalid as impairing the obligation of the contract involved in the original charter. The case was carried to the Supreme Court of the United States.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court.

* * * * This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hamp-

shire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.

The opinion of the court, after mature deliberation, is, that this is a contract the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligations has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown, it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation. * * * *

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted not merely for the perpetual application of the funds which they gave to the objects for which those funds were given; they contracted, also, to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system it totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given. * * *

It results, from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the Constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the State Court must, therefore, be

Reversed.

THE BINGHAMPTON BRIDGE.

3 WALL., 51. 1865.

The Chenango Bridge Company was chartered in 1808 by the State of New York to build and maintain a bridge over the Chenango River at Binghampton, the charter containing a covenant that no other bridge should be built within a distance of two miles either way from the company's bridge. In 1855 the State of New York authorized the Binghampton Bridge Company to build a bridge across the Chenango River within the prescribed limits, which bridge was built and opened for travel, whereupon the Chenango Bridge Company sought to enjoin the Binghampton Bridge Company from using

the bridge, claiming that the State's charter to the latter company was a law impairing the obligation of contracts and hence repugnant to the Constitution of the United States. The case was taken to the Supreme Court of the United States.

MR. JUSTICE DAVIS delivered the opinion of the court.

* * * * The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken.

A departure from it now would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. An attempt even to reaffirm it could only tend to lessen its force and obligation. It received its ablest exposition in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine, that the charters of private corporations are contracts, protected from invasion by the Constitution of the United States. And it has since so often received the solemn sanction of this court, that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

The principle is supported by reason as well as authority. It was well remarked by the chief justice in the *Dartmouth College* case, "that the objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration for the grant." The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on government to provide for them; and as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: "If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill." Such a grant is a contract, with mutual con-

siderations, and justice and good policy alike require that the protection of the law should be assured to it.

Judgment was given for the Chenango Bridge Company.

Note.—Most State Constitutions adopted since this decision provide that all charters granted by the State are subject to the right of the State to alter, amend and repeal the same.

BOSTON BEER COMPANY *v.* MASSACHUSETTS.

97 U. S., 25. 1877.

The charter of the Boston Beer Company, granted in 1828, gave it the privilege of manufacturing malt liquors in Boston. In 1869 Massachusetts passed a prohibitory liquor law which prohibited the manufacture and sale of intoxicating liquors anywhere within the State. Under this law a seizure was made of certain malt liquors of the Boston Beer Company. The company contended that the seizure was illegal because the Act of 1869 impaired the obligation of the contract contained in its charter of 1828, in violation of the contract clause of the Constitution of the United States. The Supreme Court of Massachusetts decided adversely to the Beer Company, whereupon a writ of error was prosecuted to the Supreme Court of the United States.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their varieties," it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa*, 18 Wall. 129, was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooves it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it

has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S. 645.

Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts.

Section 4

THE EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment to the Constitution of the United States provides "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

BARBIER v. CONNOLLY.

113 U. S., 27. 1885.

An ordinance of the city of San Francisco relating to the regulation and inspection of public laundries and wash-houses, among other things, provided that no person owning or employed in a public laundry or public wash-house within certain prescribed city limits should wash or iron clothes between the hours of ten in the evening and six in the morning or on Sunday. Barbier was convicted under the ordinance of washing and ironing clothes in a public laundry within the prescribed limits, between the hours of ten o'clock in the evening of May 1, 1884, and six o'clock the following day,

and was sentenced to the county jail for five days in accordance with the terms of the ordinance. Barbier petitioned for his discharge on the ground that the city ordinance violated the Fourteenth Amendment to the Constitution, in that the ordinance discriminated between laborers engaged in the laundry business and those engaged in other kinds of business; that it discriminated between laborers beyond the prescribed city limits and those within them, etc. The case was brought to the United States Supreme Court on a writ of error.

MR. JUSTICE FIELD delivered the opinion of the court.

* * * * That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a Federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations in which fires are constantly required should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any corrections of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and board of fire wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled

to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. * * *

Judgment affirmed.

YICK WO *v.* HOPKINS.

118 U. S. 356. 1885.

The plaintiff in error was a native of China named Yick Wo, who was found guilty by a Police Judge's Court of violating an ordinance of the city of San Francisco, providing that it should be unlawful for any person to engage in the laundry business within the city limits "without having first obtained the consent of the Board of Supervisors, except same be located in a building constructed either of brick or stone." Yick Wo was fined \$10, and in default of payment was sentenced to the county jail for ten

days. He petitioned to the Supreme Court of California for the writ of *habeas corpus*, alleging that he was illegally deprived of his personal liberty by the defendant, Hopkins, who was Sheriff of the City and County of San Francisco. The State court discharged the writ and remanded Yick Wo to prison. The case was then brought into the Supreme Court of the United States on a writ of error.

A similar case regarding a Chinese subject named Wo Lee was brought into the Supreme Court from the Circuit Court of the United States for the District of California and was argued and decided at the same time with the Yick Wo case.

The evidence introduced in the lower court showed that the city authorities in enforcing the ordinance discriminated against the Chinese.

MR. JUSTICE MILLER delivered the opinion of the court.

* * * * The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and

action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. * * * *

In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370; and *Soon Hing v. Crowley*, 113 U. S. 703.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public

officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. To this end,

The judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit of the United States for the District of California in the case of Wo Lee, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.

Section 5.

DUE PROCESS OF LAW AND ITS RELATION TO THE POLICE POWER.

The 14th Amendment to the Constitution provides: "Nor shall any State deprive any person of life, liberty or property, without due process of law."

MUGLER *v.* KANSAS.

123 U. S., 623. 1887.

The State of Kansas in 1880 adopted a constitution which prohibited in one of its sections the manufacture and sale of intoxicating liquors except for medicinal, scientific and mechanical purposes. In 1881 by statute the manufacture or sale, except for the specified purposes was made a misdemeanor, and it was further provided that no one should sell for either of the excepted purposes without having secured a druggist's permit therefor. Mugler was convicted of manufacturing and also selling without a permit. His conviction was affirmed by the Supreme Court of Kansas and the case

was brought into the United States Supreme Court on a writ of error.

MR. JUSTICE HARLAN delivered the opinion of the court.

* * * * The facts necessary to a clear understanding of the questions, common to these cases, are the following: Mugler and Ziebold & Hagelin were engaged in manufacturing beer at their respective establishments (constructed specially for that purpose) for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the statute of 1881, and without having the required permit. Nor did Mugler have a license or permit to sell beer. The single sale of which he was found guilty occurred in the State, and after May 1, 1881, that is, after the Act of February 19, 1881, took effect, and was of beer manufactured before its passage.

The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amendment which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law."

That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment; to some of which, in view of questions to be presently considered, it will be well to refer. * * * *

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the abso-

lute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the wills of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in *Barbier v. Connolly*, 113 U. S. 27, 31, that the Fourteenth Amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither the amendment,—broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Upon this ground—if we do not misapprehend the position of

defendants—it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile State legislation, this court in *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 751, said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone v. Mississippi*, 101 U. S. 814, 816, where the Constitution was invoked against the repeal by the State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the court said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. . . . Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." * * * *

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to

deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, 101 U. S. 814, the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in *Beer Co. v. Massachusetts*, 97 U. S. 32: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

Judgment affirmed.

MUNN *v.* ILLINOIS.

94 U. S., 113. 1876.

An Illinois statute provided that any person operating warehouses and elevators wherein grain or other property is stored within any city of more than one hundred thousand population should procure a license from the County court permitting him to transact business as a public warehouseman, and provided for a maximum charge for the storage and handling of grain received into such warehouse or elevator. Munn was convicted of operating a grain elevator and warehouse within the city of Chicago without a license. He was fined in accordance with the provisions of the statute and appealed to the Supreme Court of Illinois, which court affirmed the judgment

below. He then sued out a writ of error to the United States Supreme Court, his contention being that the Illinois statute was repugnant to the Fourteenth Amendment to the Constitution of the United States which provides that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe v. R. & B. Railroad Co.*, 27 Vt. 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread" (3 Stat. 587, sect. 7); and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers" (9 Stat. 224, sect. 2).

From this it is apparent that, down to the time of the adoption of

the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation. * * * *

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use. * * * *

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person with its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from

regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

Judgment affirmed.

GERMAN ALLIANCE INSURANCE COMPANY *v.* IKE
LEWIS.

233 U. S. 389. Decided April 20th, 1914.

The State of Kansas in 1909 passed a law, which requires every Fire Insurance Company, except domestic Farmers' Mutual Insurance Companies, to file with the Superintendent of Insurance schedules showing rates of all risks insurable by such company in the State and all the conditions which affect the rates or the value of the insurance to the insured, and gives the Superintendent of Insurance the power to determine any rate excessive or unreasonably high or not adequate to the safety or soundness of the company, in which case, and on his authority, to direct the company to publish and file a higher or lower rate, which shall be commensurate with the character of the risk; but in every case the rate shall be reasonable. The plaintiff brought a Bill in Equity against the said Superintendent of Insurance to restrain him from enforcing the provisions of this law on the ground that the law was an unconstitutional exercise of the police power of the State and contrary to the Fourteenth Amendment to the Constitution of the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The specific error complained of is the refusal of the district court to hold that the act of the State of Kansas is unconstitutional and void as offending the due process clause of the Fourteenth Amendment of the Constitution of the United States. To support this charge of error, complainant asserts that the business of fire insurance is a private business, and, therefore, there is no constitutional power in a State to fix the rates and charges for services rendered by it. An exercise of such right, it is contended, is a taking of private property for a public use. The contention is made in various ways, and, excluding possible countervailing contentions, it is urged that the act under review cannot be justified as an exercise of the police power or of the power of the State to admit foreign corporations within its borders upon such terms as it may prescribe, or of any other power possessed by the State; that no State has the power to impose unconstitutional burdens either upon private citizens or private corporations engaged in a private business.

The basic contention is that the business of insurance is a natural

right, receiving no privilege from the State, is voluntarily entered into, cannot be compelled, nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies merely. Whether such contracts shall be made at all, it is contended, is a matter of private negotiation and agreement, and necessarily there must be freedom in fixing their terms. And "where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Many elements, it is urged, determine the extending or rejection of insurance; the hazards are relative and depend upon many circumstances upon which there may be different judgments, and there are personal considerations as well—"moral hazards," as they are called. * * * *

We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private, and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern, and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor of the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the "test of whether the use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied;" or, as we have said, quoting counsel, "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle.

nor has the other contention that the service which cannot be demanded cannot be regulated. * * * *

A contract for fire insurance is one for indemnity against loss, and is personal. The admission, however, does not take us far in the solution of the question presented. Its personal character certainly does not of itself preclude regulation, for there are many examples of government regulation of personal contracts, and in the statutes of every State in the Union superintendence and control over the business of insurance are exercised, varying in details and extent. We need not particularize in detail. We need only say that there was quite early (in Massachusetts, 1837; New York, 1853) State provision for what is known as the unearned premium fund or reserve; then came the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring deposits in money or bonds, confining the business to corporations, preventing discrimination in rates, limitation of risks, and other regulations equally restrictive. In other words, the State has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise.

Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. Accidental fires are inevitable and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophies are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency, are of great concern. The other objects, direct and indirect, of insurance, we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it, and we need not dispute with the economists that this is the result of the "substitution of certain for uncertain loss," or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence

than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. * * * *

But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old, and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

If there may be controversy as to the business having such character, there can be no controversy as to what follows from such character if it be established. It is idle, therefore, to debate whether the liberty of contract guaranteed by the Constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. The order of their enactment certainly cannot be considered an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the interstate commerce act was passed, and the Commission constituted by it was not given authority to fix rates until some years afterwards. Of the agencies which those measures were enacted to regulate at the time of the creation of the power, there was no prophecy or conception. Nor was regulation immediate upon their existence. It was exerted only when the size, number, and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when it is exercised. *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366. It is oftener the existence of necessity rather than the prescience of it which dictates legislation. And so with the regulations of the business of insurance. They have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison of them in relation to the power of government, how can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations? How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rates denied, and a limitation on its risks imposed? Are not such regulations restraints upon the exercise of the personal right—asserted to be

fundamental—of dealing with property freely, or engaging in what contracts one may choose, and with whom and upon what terms one may choose?

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute; and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam, or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or to be secured in a night's accommodation at a wayside inn, or in the weight of a 5-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all of the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates as published. Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power.

The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized and doing business under the laws of the State and insuring only farm property. The charge is not discussed in the elaborate brief of counsel, nor does it seem to have been pressed in the lower court. It is, however, covered by the assignments of error.

The provision of the statute is, "That nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this State, and insuring only farm property." The distinction is therefore between co-operative insurance

companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co. v. Union County Nat. Bank*, 202 U. S. 623. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co. v. Daggs*, 172 U. S. 557. *Decree affirmed.*

Mr. Justice Lamar, the Chief Justice, and Mr. Justice Van Devanter dissented.

HOLDEN *v.* HARDY.

169 U. S. 366. 1898.

The plaintiff, Holden, was convicted of violating a State statute, making it a misdemeanor for any employer to employ workmen in underground mines or in smelters, or other institutions for the reduction or refining of ores or metals, for more than eight hours per day except in cases of emergency when life or property was in imminent danger. He was given into the custody of the defendant, as sheriff, and applied to the Supreme Court of Utah for discharge on a writ of *habeas corpus*. His application being refused, he sued out a writ of error to the Supreme Court of the United States, challenging the validity of the State statute under which he was convicted on the ground that it offended against the Fourteenth Amendment to the Constitution, in that it abridged the privileges and immunities of citizens of the United States, depriving both the employer and laborer of property without due process of law, and denying them the equal protection of the laws.

MR. JUSTICE BROWN delivered the opinion of the court.

* * * * But if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the State that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted in most if not all of the States; insane asylums, public

hospitals, and institutions for the care and education of the blind established, and special measures taken for the exclusion of infected cattle, rags, and decayed fruit. In other States laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the States, they have been generally upheld. Thus, in the case of *Commonwealth v. Hamilton Manufacturing Company*, 120 Mass. 383, it was held that a statute prohibiting the employment of all persons under the age of eighteen, and of all women laboring in any manufacturing establishment more than sixty hours per week, violates no contract of the Commonwealth implied in the granting of a charter to a manufacturing company nor any right reserved under the Constitution to any individual citizen, and may be maintained as a health or police regulation.

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting. * * * *

We are of opinion that the act in question was a valid exercise of the police power of the State, and the judgments of the Supreme Court of Utah are, therefore, *Affirmed.*

THE NORTHWESTERN FERTILIZING COMPANY *v.* VIL-
LAGE OF HYDE PARK, CHAUNCEY M. CADY, ET AL.

97 U. S. 659. 1878.

The Northwestern Fertilizing Company was chartered by the State of Illinois with the right to existence for a term of fifty years, and was empowered by its charter to establish fertilizing works in Cook County, Illinois, at any point south of the dividing line between townships thirty-seven and thirty-eight. The company

built its fertilizing factory in the designated locality. When the factory was put there, the country around about was swampy and nearly uninhabited. The evidence showed that this factory was an unendurable nuisance to the inhabitants for many miles around its location; that the stench was intolerable, producing nausea and discomfort and depreciating the value of near-by property. The company transported the offal used in its factory through the village of Hyde Park, which was about a mile from the factory. The village was incorporated by a charter authorizing it to abate a nuisance, and by ordinance the village forbade the transportation of offal or other unwholesome or offensive matter through the village and prohibited the maintenance of any offensive or unwholesome business within the limits of the village, or within one mile of those limits.

The company violated the ordinance and was fined in accordance with its provisions. The Supreme Court of Illinois sustained the fine, whereupon the company brought the case into the Supreme Court of the United States, claiming that it was protected by its charter from the enforcement against it of the ordinance complained of, and that its charter was a contract within the meaning of the contract clause of the Constitution of the United States.

MR. JUSTICE SWAYNE delivered the opinion of the court.

In the case before us it does not appear that the factory could not be removed to some other place south of the designated line, where it could be operated, and where offal could be conveyed to it from the city by some other railroad, both without rightful objection. The company had the choice of any point within the designated limits. In that respect there is no restriction.

The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future, by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them.

There is a class of nuisances designated "*legalized*." There are cases which rest for their sanction upon the intent of the law under which they are created, the paramount power of the Legislature, the principle of "the greatest good for the greatest number," and the importance of the public benefit and convenience involved in their continuance. * * * *

The decree of the Supreme Court of Illinois is affirmed.

NOBLE STATE BANK *v.* C. N. HASKELL, ET AL.

219 U. S. 104. 1911.

This was a proceeding against the Governor of the State of Oklahoma and other officials who constitute the State Banking Board to prevent them from levying and collecting an assessment from the Noble State Bank under an Act passed by the State in 1907. This act creates the Board and directs it to levy upon every bank existing under the Laws of the State an assessment of 1% of the bank's average daily deposits, with certain daily deductions, for the purpose of creating a depositors' guaranty fund. There are provisos for keeping up the fund, and by an Act passed March 11th, 1909, since the suit was begun, the assessment was raised to 5%. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the bank commissioner, if its cash immediately available is not enough to pay depositors in full, the banking board is to draw from the depositors' guaranty fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff said that it was solvent, and did not want the help of the guaranty fund, and that it could not be called upon to contribute toward securing or paying the depositors in other banks, consistently with Article I, Sec. 10, and the 14th Amendment of the Constitution of the United States. The petition was dismissed by the Supreme Court of the State.

MR. JUSTICE HOLMES delivered the opinion of the Court:

The reference to Article I, Sec. 10, does not strengthen the plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the Act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. See *Sherman v. Smith*, 1 Black, 587. Whether it does so or not is the only question in the case. * * * * The substance of the plaintiff's (i. e., the bank's) argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see *Danby Bank v. State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a

private use. *Clark v. Nash*, 198 U. S. 361, etc. * * * * And in the next, it would seem that there may be other cases besides the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190, etc. * * * * At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object, and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt, rightly, that the inspections may be required and the cost thrown on the bank. See *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386. The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling v. Chicago*, 177 U. S. 183, etc. * * * * So far is that from being the case that the device is a familiar one. It was adopted by some States the better part of a century ago, and seems never to have been questioned until now. *Danby Bank v. State Treasurer*, 39 Vt. 92, etc. * * * *

It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decision on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349. * * * *

It will serve as a datum on this side, that, in our opinion, the statute before us is well within the State's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Citizens' L. Asso. v. Topeka*, 20 Wall. 655 * * * * The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former, and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma Legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong. * * * * Some further details might be mentioned, but we deem them unnecessary. Of course, objections under the State Constitution are not open here. *Judgment affirmed.*

Note.—See also *Minnesota Rate Cases*, page 212, and as to due process of law and its relation to the taxing power, see *McCray v. U. S.*, page 143.

Section 6.

THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT.

Article IV, section 4, of the Constitution of the United States provides: "The United States shall guarantee to every State in this Union a Republican Form of Government."

THE OREGON INITIATIVE AND REFERENDUM.

PACIFIC STATES TELEPHONE & TELEGRAPH COMPANY *v.* STATE OF OREGON.

223 U. S. 118 (1912).

This case was brought to the Supreme Court of the United States upon a writ of error from the Supreme Court of the State of Oregon which affirmed a judgment of the Circuit Court for Multnomah

County in that State enforcing a tax on the gross revenue of a domestic corporation. The facts were as follows:

In 1902 Oregon amended its Constitution. This amendment, while retaining an existing clause vesting the exclusive legislative power in a general assembly consisting of a senate and a house of representatives, added to that provision the following: "But the people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." (Art. 4, Sec. 1.) Specific means for the exercise of the power thus reserved was contained in further clauses authorizing both the amendment of the Constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted, when approved by popular vote, should become the law of the State. The second, the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such reference to take place either as the result of the action of the legislature itself, or of a petition filed for that purpose by a specified number of voters.

In 1903 detailed provisions for the carrying into effect of this amendment were enacted by the legislature.

By resort to the initiative in 1906, a law taxing certain classes of corporations was submitted, voted on, and promulgated by the governor in 1907 as having been duly adopted. By this law telephone and telegraph companies were taxed, by what was qualified as an annual license, 2 per centum upon their gross revenue derived from business done within the State. Penalties were provided for non-payment, and methods were created for enforcing payment in case of delinquency.

The Pacific States Telephone & Telegraph Company, an Oregon corporation engaged in business in that State, made a return of its gross receipts, as required by the statute, and was accordingly assessed 2 per cent. upon the amount of such return. The suit which is now before us was commenced by the state to enforce payment of this assessment and the statutory penalties for delinquency. The petition alleged the passage of the taxing law by resort to the initiative, the return made by the corporation, the assessment, the duty to pay, and the failure to make such payment.

The corporation contested the tax principally upon the ground that the creation by a State of the power to legislate by the initiative and referendum caused the prior lawful State government to be bereft of its lawful character and destroyed all government republi-

can in form in Oregon, within the meaning of Section 4, Article IV, of the Constitution of the United States, providing, "the United States shall guarantee to every State in this Union a republican form of government."

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

* * * * In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed, the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is, at one and the same time, one and the same government, which is republican in form, and not of that character. * * * *

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other, suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case,—*Luther v. Borden*, 7 How. 1.

The case came from a circuit court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island, and the conflict which was brought about by the effort of the adherents of that alleged government, sometimes described as "the government established by a voluntary convention," to overthrow the established charter government. The defendants justified on the ground that the acts done by them, charged as a trespass, were done under the authority of the charter government during the prevalence of martial law, and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government, and denied the legality of the charter government. In the course of the trial the plaintiff, to support the contention of the illegality of the charter government and the legality of the voluntary government, "although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers," offered certain evidence tending to show

that nevertheless it was "the lawful and established government," upon the ground that its powers to govern have been ratified by a large majority of the male people of the State of the age of twenty-one years and upwards, and also by a large majority of those who were entitled to vote for general officers cast in favor of a Constitution which was submitted as the result of a voluntarily assembled convention of what was alleged to be the people of the State of Rhode Island. The circuit court rejected this evidence and instructed the jury that, as the charter government was the established State government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, at the outset pointed out "the novelty and serious nature" of the question which it was called upon to decide. Attention also was at the inception directed to the far-reaching effect and gravity of the consequences which would be produced by sustaining the right of the plaintiff to assail and set aside the established government by recovering damages from the defendants for acts done by them under the authority of, and for the purpose of sustaining, such established government. * * *

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the Executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts. * * *

As the issues presented, in their very essence are and have long

since by this court been definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Dismissed for want of jurisdiction.

Note.—The provisions in the Constitution of Oregon for the initiative, the referendum and the recall are given in the appendix.

Note.—The case of *Kiernan vs. City of Portland* was decided by the Supreme Court at the same time with the *Pacific States Telephone and Telegraph Company vs. Oregon* case. The Constitution of Oregon reserved to the voters of a municipality the powers of the initiative and referendum as to all local, special and municipal legislation. The people of the city of Portland by initiative petition requested the city to build a bridge across the Willamette River at Broadway street within the said city. An amendment to the city charter providing for the construction of the bridge and for issuing bonds in a sum not to exceed \$2,000,000 to pay for the same was adopted by popular vote. Kiernan, a taxpayer of the city, brought suit to restrain the sale of the bonds, upon the ground that the initiative proceedings were unconstitutional, as the State government has ceased to be republican in form since the adoption of the initiative and referendum. The Court held that the matter was not a judicial question, but a political one, solely for Congress to determine.

Section 7.

OTHER GUARANTEES.

See cases grouped under Chapter II, Section VII, Restrictions on the Powers of Congress.

CHAPTER V.

State Comity

Section 1.

**FULL FAITH AND CREDIT SHALL BE GIVEN TO THE ACTS,
RECORDS AND JUDGMENTS OF ANOTHER STATE.**HANLEY *v.* DONOGHUE.

116 U. S., 1. 1885.

Michael Hanley and William F. Welch recovered a judgment in the State of Pennsylvania against two joint defendants, Charles Donoghue, who had been duly summoned to appear before the court, and John Donoghue, who had not been duly summoned. This judgment was valid and enforceable under the laws of Pennsylvania. Hanley and Welch sued Charles Donoghue on this judgment in Maryland, but the lower court refused to consider the judgment as binding upon it and gave judgment for Donoghue. This decision was affirmed by the highest court of the State. Hanley and Welch then appealed the case to the United States Supreme Court on the ground that they were denied a right and privilege to which they are entitled under Art. IV, Sec. 1. of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

By the settled construction of these provisions of the Constitution and statutes of the United States, a judgment of a State court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another State, as it has in the State in which it was rendered. And it is within the power of the legislature of a State to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action. * * * *

No court is to be charged with the knowledge of foreign laws ; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. It is equally well settled that the several States of the Union are to be considered as in this respect foreign to each other, and that the courts of one State are not presumed to know, and therefore not bound to take judicial notice of, the laws of another State. * * * *

Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause of the parties.

Congress, in the execution of the power conferred upon it by the Constitution, having prescribed the mode of attestation of records of the courts of one State to entitle them to be proved in the courts of another State, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the State from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. *Knowles v. Gaslight & Coke Co.*, 19 Wall. 58. But Congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the State in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.

Upon principle, therefore, and according to the great preponderance of authority, whenever it becomes necessary for a court of one State, in order to give full faith and credit to a judgment rendered in another State, to ascertain the effect which it has in that State, the law of that State must be proved, like any other matter of fact. * * * *

When exercising an original jurisdiction under the Constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States.

But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here.

In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every State of the Union, because those laws are known to the court below as laws alone, needing no averment or proof.

But on a writ of error to the highest court of a State, in which the revisory power of this court is limited to determining whether a

question of law depending upon the Constitution, laws, or treaties of the United States has been erroneously decided by the State court upon the facts before it,—while the law of that State, being known to its court as law, is of course within the judicial notice of this court at the hearing on error,—yet, as in the State court the laws of another State are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in *Green v. Van Buskirk*, 7 Wall. 139. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to fact, is limited to the statement made in the court below, cannot be questioned." *Talbot v. Seeman*, 1 Cranch, 1, 38.

Where by the local law of a State (as in *Tennessee, Hobbs v. Memphis & C. R. Co.*, 9 Heisk. 873) its highest court takes judicial notice of the laws of other States, this court also, on writ of error, might take judicial notice of them. But such is not the case in Maryland, where the Court of Appeals has not only affirmed the general rule that foreign laws are facts, which, like other facts, must be proved before they can be received in evidence in courts of justice; but has held that the effect which a judgment rendered in another State has by the law of that State is a matter of fact, not to be judicially noticed without allegation and proof; and consequently that an allegation of the effect which such a judgment has by law in that State is admitted by demurrer.

From these considerations it follows that the averment, in the third count of the declaration, that by the law of Pennsylvania the judgment entered in that State against Charles Donoghue and John Donoghue was valid and enforceable against Charles, who had been served with process in that State, and void against John, who had not been so served, must be considered, both in the courts of Maryland, and in this court on writ of error to one of those courts, an allegation of fact, admitted by the demurrer.

Upon the record before us, therefore, the plaintiff appears to be entitled, under the Constitution and laws of the United States, to judgment on this count. The general judgment for the defendant is erroneous, and the right of both parties will be secured by ordering, in the usual form, that the

Judgment of the Court of Appeals of Maryland be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Section 2.

PRIVILEGES AND IMMUNITIES OF CITIZENS.

CORFIELD *v.* CORYELL.

4 WASH. C. C., 371. 1823.

In 1820 the State of New Jersey passed an act regulating the business of dredging for oysters. This act excluded the inhabitants and residents of other States from the privilege of taking or gathering oysters in any of the rivers, bays and waters of the State. One of the penalties provided by the statute was the forfeiture of the boat and apparatus used by any non-resident in gathering oysters in violation of the statute.

The defendant, one of the constables of Cumberland County, arrested the plaintiff, a non-resident of New Jersey, whom he found, gathering oysters in Maurice River Cove, and seized his boat and sold it. The plaintiff brought an action of trespass for the taking of his property in the United States Circuit Court for the Eastern District of Pennsylvania. The plaintiff contended that the New Jersey Act of 1820 infringes that section of the Constitution of the United States which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

WASHINGTON, CIRCUIT JUSTICE, delivered the opinion of the court.

The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads; Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the

general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old Articles of Confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union." But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens. A several fishery, either as the right to its respects running fish, or such as are stationary, such as oysters, clams and the like, is as much the property of the individual to whom it belongs as dry land or land covered by water; and is equally protected by the laws of the State against the aggressions of others; whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the State. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent or the express permission of the sovereign who has the power to regulate its use. * * * * The oyster beds belonging to a State may be abundantly sufficient for the use of the citizens of that State, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other States from taking them, except under such limitations and restrictions as the laws may prescribe."

Judgment entered for defendant.

Section 3.

EXTRADITION BETWEEN STATES.

KENTUCKY *v.* DENNISON.

24 HOWARD, 66. 1860.

Willis Lago, a free negro resident of Kentucky, assisted a slave to escape and then he, himself, fled to Ohio. Lago's act being a crime

under the laws of Kentucky, the Governor of Kentucky demanded him as a fugitive from justice to be delivered up by the Governor of Ohio. The demand was refused, whereupon Kentucky brought suit in the United States Supreme Court asking for a mandamus to compel Dennison, the Governor of Ohio, to deliver Lago to the State authorities. Kentucky claimed that the matter in dispute was covered by Art. IV, Sec. 2, of the Constitution of the United States, which reads thus: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." To execute this obligation of the Constitution, the Act of Congress of 1793 was passed, which provides: "It shall be the duty of the executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demands, or to the agent of such authority appointed to receive the fugitive to be delivered to such agent when he shall appear."

MR. CHIEF JUSTICE TANEY delivered the opinion of the court.

The clause (of the Constitution) in question. . . . authorizes the demand to be made by the Executive authority of the state where the crime was committed, but does not in so many words specify the officer of the State upon whom the demand is to be made, and whose duty it is to have the fugitive delivered and removed to the State having jurisdiction of the crime. * * * *

The demand being thus made, the Act of Congress declares, that, "it shall be the duty of the Executive authority of the State," to cause the fugitive to be arrested and secured and delivered to the agent of the demanding State. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of the opinion, the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his

time, and disable him from performing his obligations to the State, and might impose upon him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And we are far from supposing, that in using the word "duty," the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution.

The motion for the mandamus must be overruled.

Appendix

FEDERAL AND STATE STATUTES

Note.—The important sections only of the particular statutes have been given.

THE SHERMAN ANTI-TRUST LAW.

Act of July 2, 1890.

AN ACT to protect trade and commerce against unlawful restraints and monopolies.

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall

be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, or the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

THE FEDERAL TRADE COMMISSION ACT.

Approved and effective September 26th, 1914.

Note.—Important parts of sections only are set forth.

MEMBERSHIP IN COMMISSION.

SECTION 1. That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

SALARY OF COMMISSIONERS.

SEC. 2. That each commissioner shall receive a salary of \$10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States.

BUREAU OF CORPORATIONS ABOLISHED.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

MEANING OF TERMS USED.

SEC. 4. Defines the meaning of the terms, Commerce, Corporation, Anti-Trust Act, Documentary Evidence.

PROCEDURE ESTABLISHED AND EFFECT OF DECREES.

SEC. 5. *That unfair methods of competition in commerce are hereby declared unlawful.*

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, *it shall issue and serve upon such person, partnership, or corporation a complaint, stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.* The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. *If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition.* Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. * * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

POWERS OF THE COMMISSION.

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the anti-trust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to

investigate and report the facts relating to any alleged violations of the anti-trust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

REFERENCE OF EQUITY SUITS TO COMMISSION.

SEC. 7. Provides that the Courts may refer equity suits brought by or under direction of Attorney General under the anti-trust Acts to the commission for findings and decree.

RIGHT TO PAPERS, RECORDS, ETC., OF GOVERNMENT.

SEC. 8. Provides that departments and bureaus of the Government shall furnish the commission with all records, papers, and information relating to any corporation, subject to the provisions of the Act.

RIGHT TO PAPERS, RECORDS, ETC., OF CORPORATIONS AND TO COMPEL ATTENDANCE OF WITNESSES.

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

PENALTIES FOR VIOLATIONS OF ORDERS OR REQUIREMENTS.

SEC. 10. Provides the penalties for violations of the orders, decrees or requirements of the commission.

ACT DOES NOT REPEAL ANTI-TRUST OR COMMERCE ACTS.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the anti-trust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said anti-trust Acts or the Acts to regulate commerce or any part or parts thereof.

THE CLAYTON ANTI-TRUST LAW.

Approved October 15th, 1914.

Note.—Important parts of sections only are set forth.

DEFINITION OF TERMS.

SECTION 1. Defines the terms Anti-Trust Laws, Commerce and Persons.

PRICE DISCRIMINATION.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein

contained shall prevent discrimination in price between purchasers of commodities on account of difference in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

EXCLUSIVE AGREEMENTS.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

DIRECT REMEDY FOR PERSON INJURED IN BUSINESS.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 5. Provides that final conviction of violation of anti-trust laws in a suit by the United States shall be prima facie evidence against the same defendant in any suit brought by a private party under the anti-trust law.

LAW NOT TO APPLY TO LABOR ORGANIZATIONS.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

STOCK CONTROL OF COMPETING CORPORATIONS.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the anti-trust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

INTERLOCKING DIRECTORATES.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company,

organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. * * * *

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws.

CRIMINAL PROSECUTION OF OFFICERS OF CORPORATIONS.

SEC. 9. Provides for criminal prosecution of president, director, officer or manager of any firm or corporation who embezzles, steals or willfully misapplies moneys, funds, credits, securities, property or assets accruing from or used in interstate commerce.

INTERLOCKING DIRECTORATES WITH COMPANIES FURNISHING SUPPLIES.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of

directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

PROCEDURE FOR ENFORCEMENT OF ACT.

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

(1) Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

(2) The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board.

(3) If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals

of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

(4) If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. * * *

(5) The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

(6) Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

DISTRICT FOR SUIT AGAINST CORPORATION.

SEC. 12. That any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

WITNESSES.

SEC. 13. Provides that witnesses may be brought from districts outside of that in which suit is brought, *i. e.*, from anywhere in the United States.

PERSONAL LIABILITY OF OFFICERS OF CORPORATIONS.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction thereof of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

RESTRAINT OF VIOLATIONS OF ACT.

SEC. 15. Provides that United States District Attorneys shall institute proceedings in equity to prevent and restrain violations of the Act.

INJUNCTIONS AGAINST THREATENED VIOLATIONS.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceeding, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act.

PRELIMINARY INJUNCTIONS.

SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.

SEC. 18. Provides for security being entered before preliminary injunctions can issue under the Act.

SEC. 19. Provides that every order of injunction shall specifically describe the acts restrained.

INJUNCTIONS IN LABOR DISPUTES.

SEC. 20. Provides that no injunction shall be granted in cases between employer and employees involving terms or conditions of employment, unless necessary to prevent irreparable injury to property. And no such restraining

order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

CONTEMPT.

SEC. 21. Provides that persons violating the Act may not only be proceeded against criminally, but also may be punished for contempt.

PROCEDURE IN CONTEMPT CASES.

JURY TRIALS.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place

of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months.

SEC. 23. Provides for appeal in contempt cases.

CONTEMPTS COMMITTED IN PRESENCE OF COURT.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 25. Provides that no proceeding for contempt shall be instituted unless begun within one year from date of the act complained of.

CONSTITUTIONALITY OF SECTIONS OF THE ACT.

SEC. 26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved October 15, 1914.

THE ARBITRATION ACT.

Act of July 15, 1913, known as the Newlands Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the provisions of this Act shall apply to any common carrier or carriers and their officers, agents, and employes, except masters of vessels and seamen, as defined in section forty-six hundred and twelve, Revised Statutes of the United States, engaged in the transportation of passengers or property

wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. * * *

SEC. 2. That whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between an employer or employers and employees subject to this Act interrupting or threatening to interrupt the business of said employer or employers to the serious detriment of the public interest, either party to such controversy may apply to the Board of Mediation and Conciliation created by this Act and invoke its services for the purpose of bringing about an amicable adjustment of the controversy; and upon the request of either party the said board shall with all practicable expedition put itself in communication with the parties to such controversy and shall use its best efforts, by mediation and conciliation, to bring them to an agreement; and if such efforts to bring about an amicable adjustment through mediation and conciliation shall be unsuccessful, the said board shall at once endeavor to induce the parties to submit their controversy to arbitration in accordance with the provisions of this Act.

In any case in which an interruption of traffic is imminent and fraught with serious detriment to the public interest, the Board of Mediation and Conciliation may, if in its judgment such action seem desirable, proffer its services to the respective parties to the controversy.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act either party to the said agreement may apply to the Board of Mediation and Conciliation for an expression of opinion from such board as to the meaning or application of such agreement and the said board shall upon receipt of such request give its opinion as soon as may be practicable.

SEC. 3. That whenever a controversy shall arise between an employer or employers and employees subject to this Act, which cannot be settled through mediation and conciliation in the manner provided in the preceding section, such controversy may be submitted to the arbitration of a board of six, or, if the parties to the controversy prefer so to stipulate, to a board of three persons, which board shall be chosen in the following manner: In the case of a board of three, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; and the two arbitrators thus chosen shall select the third arbitrator; but in the event of their failure to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Board of Mediation and Conciliation. In the case of a board of six, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators, and the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators; but in the event of their failure to name the two arbitrators within fifteen days after their first meeting the said two arbitrators, or as many of them as have not been named, shall be named by the Board of Mediation and Conciliation.

In the event that the employes engaged in any given controversy are not members of a labor organization, such employes may select a committee which shall have the right to name the arbitrator, or the arbitrators, who are to be named by the employes as provided above in this section.

SEC. 4. That the agreement to arbitrate—

First. Shall be in writing;

Second. Shall stipulate that the arbitration is had under the provisions of this Act;

Third. Shall state whether the board of arbitration is to consist of three or six members;

Fourth. Shall be signed by duly accredited representatives of the employer or employers and of the employes;

Fifth. Shall state specifically the questions to be submitted to the said board for decision;

Sixth. Shall stipulate that a majority of said board shall be competent to make a valid and binding award;

Seventh. Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board, as provided for in the agreement, within which the said board shall commence its hearings;

Eighth. Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That this period shall be thirty days unless a different period be agreed to;

Ninth. Shall provide for the date from which the award shall become effective and shall fix the period during which the said award shall continue in force;

Tenth. Shall provide that the respective parties to the award will each faithfully execute the same;

Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon the parties to the agreement unless set aside for error of law apparent on the record;

Twelfth. May also provide that any difference arising as to the meaning or the application of the provisions of an award made by a board of arbitration shall be referred back to the same board or to a sub-committee of such board for a ruling, which ruling shall have the same force and effect as the original award; and if any member of the original board is unable or unwilling to serve, another arbitrator shall be named in the same manner as such original member was named.

SEC. 5. (This section gives the arbitrators the power to administer oaths, require the attendance and testimony of witnesses, production of documents, etc.) * * * *

SEC. 8. That the award, being filed in the clerk's office of a district court of the United States as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation, and judgment be entered accordingly, when such exceptions shall have been finally disposed of either by said district court or on appeal therefrom.

At the expiration of ten days from the decision of the district court upon exceptions taken to said award as aforesaid judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

If exceptions to an award are finally sustained, judgment shall be entered setting aside the award in whole or in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Nothing in this Act contained shall be construed to require an employe to render personal service without his consent, and no injunction or other legal process shall be issued which shall compel the performance by any employe against his will of a contract for personal labor or service. * * * *

SEC. 10. That each member of the board of arbitration created under the provisions of this Act shall receive such compensation as may be fixed by the Board of Mediation and Conciliation, together with his traveling and other necessary expenses. * * * *

SEC. 11. There shall be a Commissioner of Mediation and Conciliation, who shall be appointed by the President, by and with the advice and consent of the Senate, and whose salary shall be \$7,500 per annum, who shall hold his office for a term of seven years and until a successor qualifies, and who shall be removable by the President only for misconduct in office. The President shall also designate not more than two other officials of the Government who have been appointed by and with the advice and consent of the Senate, and the officials thus designated, together with the Commissioner of Mediation and Conciliation, shall constitute a board to be known as the United States Board of Mediation and Conciliation.

There shall also be an Assistant Commissioner of Mediation and Conciliation, who shall be appointed by the President, by and with the advice and consent of the Senate, and whose salary shall be \$5,000 per annum. In the absence of the Commissioner of Mediation and Conciliation, or when that office shall become vacant, the assistant commissioner shall exercise the functions and perform the duties of that office. Under the direction of the Commissioner of Mediation and Conciliation, the assistant commissioner

shall assist in the work of mediation and conciliation and when acting alone in any case he shall have the right to take acknowledgments, receive agreements of arbitration and cause the notices in writing to be served upon the arbitrators chosen by the respective parties to the controversy, as provided for in section five of this Act.

The Act of June first, eighteen hundred and ninety-eight, relating to the mediation and arbitration of controversies between railway companies and certain classes of their employes is hereby repealed: *Provided*, That any agreement of arbitration which, at the time of the passage of this Act, shall have been executed in accordance with the provisions of said Act of June first, eighteen hundred and ninety-eight, shall be governed by the provisions of said Act of June first, eighteen hundred and ninety-eight, and the proceedings thereunder shall be conducted in accordance with the provisions of said Act.

THE SAFETY APPLIANCE ACT.

Act March 2, 1893.

AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this Act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this Act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this Act.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until other wise ordered by the Interstate Commerce Commission,

it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this Act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as foresaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for. * * *

Note.—Prescribed standard height of drawbars: Standard-gauge roads, 34½ inches; narrow-gauge roads, 26 inches; maximum variation between loaded and empty cars, 3 inches.

THE HOURS OF SERVICE ACT.

Act March 4, 1907.

AN ACT to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such District Attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper District Attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

Note.—In **Baltimore & Ohio Railroad Company v. Interstate Commerce Commission**, 221 U. S. 612, the Supreme Court held that the Hours of Service Act, limiting the hours of service of employees upon railroads engaged in interstate commerce was constitutional, even though the interstate and intrastate transactions of the carriers were so interwoven that

it was utterly impracticable to divide the employees so that those engaged in interstate commerce should be confined to that commerce exclusively. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by the commingling of duties relating to intrastate operations.

THE COMMODITIES CLAUSE.

Act of June 29, 1906.

AN ACT to regulate commerce.

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

THE EMPLOYERS' LIABILITY ACT.

Act of Congress of April 22, 1908, and Amendment of April 5, 1910.

AN ACT relating to the liability of common carriers by railroads to their employees in certain cases.

Be it enacted, etc., That every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama canal zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if

none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any neglect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

SEC. 7. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees under any other Act or Acts of Congress. * * * *

AMENDMENT OF 1910 TO EMPLOYERS' LIABILITY ACT.

AN ACT to amend an Act entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight.

Be it enacted, etc., That an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," ap-

proved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read :

SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

SEC. 2. That said Act be further amended by adding the following section as section nine of said Act :

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury."

Approved, April 5, 1910.

WHITE SLAVE TRAFFIC ACT.

Act of June 25, 1910, known as the Mann Act.

Be it enacted, etc., That the term "interstate commerce" as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term "foreign commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia.

SEC. 2. That any person shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the

intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years or by both such fine and imprisonment, in the discretion of the court.

SEC. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.

Note.—In the cases of *Diggs v. United States*, and *Caminetti v. United States*, 220 Fed. 545, which were heard and decided together on April 8th, 1915, Diggs and Caminetti were charged with violating the White Slave Traffic Act in that they each transported a woman from Sacramento, California, to Reno, Nevada, for the purpose of debauchery and for an immoral purpose. The defendants were found guilty in the lower court of the crime charged and appealed to the United States Circuit Court of Appeals. One of their contentions was that the Court in its instructions to the jury gave to the words "concubine" and "mistress" too wide and inclusive a meaning. They argued that by transporting the women for the purpose of making them their concubines and mistresses they were not guilty of the offense defined in the Act; that the words "prostitution and debauchery, or any other immoral practice," do not include concubinage, but that the

immorality denounced by the White Slave Traffic Act is only commercialized vice. The Circuit Court of Appeals held that the Federal decisions were against these contentions, citing *Hoke v. United States*, 227 U. S. 308; *Athanasaw v. United States*, 227 U. S. 326; *United States v. Bitty*, 208 U. S. 393. The defendants then petitioned the United States Supreme Court for a writ of certiorari, which was denied on June 4, 1915, and afterwards, upon a petition for rehearing, was granted on June 21, 1915. The matter is now pending in the Supreme Court.

In *United States v. Bitty*, *supra*, the defendant was indicted with the offense of having imported into the United States from England an alien woman for an immoral purpose, viz., that she should live with him as his concubine or mistress, in violation of the immigration laws. The defendant maintained that his purpose in importing the woman was not immoral within the meaning of the statute, in that the statute referred to the bringing of such women into this country for the purpose of prostitution. The Supreme Court held that the act of the defendant was within the meaning of the statute. In *Athanasaw v. United States*, *supra*, the defendant employed a woman at Atlanta, Ga., as a chorus girl and paid her railroad fare to Tampa, Fla., where she was to appear in a musical show. He then led her to surroundings such as tended to induce her to give herself up to a condition of debauchery. The Supreme Court held that the language of the White Slave Traffic Act is directed against the transportation of any woman for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intention and purpose to induce, entice or compel a woman to become a prostitute, or give herself up to debauchery, or engage in any other immoral practice; that the term debauchery as used in the statute has an idea of sexual immorality, and that the act of the defendant was within the meaning of the statute. In *Hoke et al. v. United States*, *supra*, one of the defendants induced a woman to go from New Orleans, La., to Beaumont, Texas, for the purpose of prostitution. The defendants claimed that it was the right and privilege of a person to move between the States, and that such being the right, another cannot be made guilty of a crime of inducing or aiding in the exercise of it; that the motive or intention of the passenger is not a matter of interstate commerce; that the States are the proper parties to control the morals of their citizens and to define prostitution as a crime. The Supreme Court sustained the conviction of the defendants, stating that "It is misleading to say that men and women have rights; their rights cannot fortify or sanction their wrongs, and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the Act of July 25, 1910, and we need go no further in the present case."

WEBB ACT.

AN ACT divesting intoxicating liquors of their interstate character in certain cases.

Passed over the President's veto by the Senate February 28, 1913, and by the House of Representatives March 1, 1913.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the shipment or transporta-

tion in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Note.—In the case of **Adams Express Company v. Kentucky**, decided by the Supreme Court of the United States on June 14th, 1915, certain intoxicating liquors were bought and paid for in Tennessee and were transported by the express company from that State into the State of Kentucky for the personal use of the consignee, without any intention on his part to dispose of them contrary to the law of the State. Kentucky had a local option law and a law which made it unlawful for any public or private carrier to bring intoxicating liquors into any county or place where the sale of intoxicating liquors had been prohibited. The Court of Appeals of Kentucky decided "that there was never even a claim of a right on the part of the Legislature to interfere with a citizen using liquor for his own comfort, provided that in so doing he committed no offence against public decency by being intoxicated." The Supreme Court of the United States in reviewing the case pointed out that after the decision in *Leisy v. Hardin*, Congress passed the Wilson Act of 1890, which made intoxicating liquors transported in interstate commerce subject to the police power of the State upon their arrival in the State. The Court said that there was nothing in the Wilson Act to prevent the shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the State. Congress thereupon undertook by the Webb Act to prohibit the introduction of liquors into the States by means of interstate commerce. The Webb Act, however, was an act "divesting intoxicating liquors of their interstate character in certain cases," and did not assume to prohibit all interstate shipments of liquor into dry territory. The plain intention of Congress was to render the prohibition of the statute operative only where the liquor was to be dealt with in violation of the local law of the State into which it is shipped. The Court therefore held that, by the provisions of the Webb Act, shipments into a State of intoxicating liquors, intended solely for the personal use of the consignee and not to be used in violation of the State laws, were not subject to the operation of a State statute, as in the Kentucky case, forbidding carriers to bring intoxicating liquors into any dry territory.

THE FOOD AND DRUGS ACT.

Act of June 30, 1906.

AN ACT for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, etc.

SECTION 1. That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.

SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

(Sec. 3 provides that the Secretary of Treasury, Secretary of Agriculture, and Secretary of Commerce and Labor shall make regulations for carrying out the Act, and collecting and examining specimens of foods and drugs.)

SEC. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of

determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States District Attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 7. That for the purposes of this Act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*,^o That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservatives shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

SEC. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

Note.—On May 29th, 1911, the Supreme Court decided in the case of **United States v. O. A. Johnson**, 221 U. S. 488, that false and misleading statements in the labels on a proprietary medicine as to its curative or remedial effects, which did not import any statement concerning the identity or ingredients of the medicine are not "misbranded" within the meaning of the Food and Drugs Act, which defined that term as applicable to all drugs or articles of food, the package or label of which shall bear any statement, design or device regarding such article, ingredients or substance contained therein, which shall be false or misleading in any particular. In that case, O. A. Johnson was indicted for delivering for shipment from Missouri to Washington, District of Columbia, packages and bottles of medicine bearing labels that stated or implied that the contents were effective in curing cancer; the District Court quashed the indictment and its action in this regard was sustained by the Supreme Court, the Court holding that the false statements meant by the Act, according to its plain language, were false statements as to what the ingredients of the drug were. As a consequence of this decision the **Sherley Amendment to the Pure Food and Drugs Act** was passed by Congress and

approved August 3rd, 1913, which provides it is a "misbranding" in the case of drugs:

"If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

On March 3rd, 1913, the Food and Drugs Act was further amended by what is known as the **Gould or Net Weight Act** which makes it a violation of the act,

"If in package form, the quantity of contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerance and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section three of this Act."

Note.—On February 24th, 1914, the Supreme Court decided in the case of **United States v. Lexington Mill and Elevator Company**, 232 U. S. 399, that Section 7 of the Food and Drugs Act, relating to adulteration of food and drugs, was not violated in the treatment of flour by the "Alsop Process," so-called, by which nitrogen peroxide gas, generated by electricity, was mixed with atmospheric air and then brought in contact with the flour, resulting in the bleaching of the product. The government contended that it *need not prove that the flour, or foodstuffs made by the use of it, would injure the health of a consumer, but only that the added substance was injurious*. The company maintained that the substances introduced in the flour by the Alsop Process in the proportion of 1.8 parts per million would not prove injurious to health. The court said: "The testimony shows that the effect of the Alsop Process is to bleach or whiten the flour, and thus make it more marketable. If the testimony introduced on the part of the respondent was believed by the jury, they must necessarily have found that the added ingredient, nitrites of a poisonous character, did not have the effect to make the consumption of the flour by any possibility injurious to the health of the consumer. The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was, and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. * * * Applying these well-known principles in considering this statute, we find that the fifth sub-division of § 7 provides that food shall be deemed to be adulterated 'if it contain any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*' The instruction of the trial court permitted this statute to be read

without the final and qualifying words concerning the effect of the article upon health. If Congress had so intended, the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. It did not do so, but only condemned food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food injurious to health."

THE MEAT INSPECTION ACT.

Act of March 4, 1907.

That hereafter for the purpose of preventing the use in interstate or foreign commerce as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment in which they are to be slaughtered and the meat and meat food products thereof are to be used in interstate or foreign commerce; and all cattle, swine, sheep and goats found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other cattle, sheep, swine or goats, and when so slaughtered, the carcasses of said cattle, sheep, swine or goats shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary of Agriculture, as herein provided for.

That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose, as hereinafter provided, a post-mortem examination and inspection of the carcasses and parts thereof, of all cattle, swine, sheep and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering or similar establishment in any State, Territory or District of Columbia for transportation or sale as articles of interstate or foreign commerce, and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped, tagged or labeled as "Inspected and Passed;" and said inspectors shall label, mark, stamp or tag as "Inspected and Condemned" all carcasses and parts thereof of animals found to be unsound, unhealthful and unwholesome or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors after said first inspection shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome or in any way unfit for human food, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the

first examination and inspection, be found to be unsound, unhealthful, unwholesome or otherwise unfit for food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector.

That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering or similar establishment, and for the purposes of any examination and inspection said inspector shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag or label as "Inspected and Passed" all such products found to be sound, healthful and wholesome, and which contain no dyes, chemicals, preservatives or ingredients which render such meat, or meat food products unsound, unhealthful, unwholesome and unfit for human food; and said inspector shall label, mark, stamp or tag as "Inspected and Condemned" all such products found unsound, unhealthful and unwholesome, or which contain dyes, chemicals, preservatives or ingredients which render such meat, or meat food products unsound, unhealthful, unwholesome or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes as hereinbefore provided.

The Secretary of Agriculture shall cause to be made by experts in sanitation, or by other competent inspectors, such inspection of all slaughtering, meat-canning, salting, packing, rendering or similar establishments in which cattle, sheep, swine, and goats are slaughtered, and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishment shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food product are rendered unclean, unsound, unhealthful, unwholesome or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as "Inspected and Passed."

That on and after October 1, 1907, no person, firm or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory, or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof, which have not been inspected, examined and marked as "Inspected and Passed," in accordance with the terms of this Act.

That the provisions of this Act requiring an inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported as interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: *Provided*, that if any person shall sell or offer for sale or transportation for interstate or foreign commerce any meat, or meat food products which are diseased, unsound, unhealthful,

unwholesome, or otherwise unfit for human food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment for a period of not exceeding one year, or by both such fine and imprisonment.

THE IMMIGRATION LAW.

Act of February 20, 1907, as amended by the Act of March 26, 1910.

AN ACT to regulate the immigration of aliens into the United States.

That there shall be levied, collected, and paid a tax of four dollars for every alien entering the United States. The said tax shall be paid to the collector of customs of the port or customs district to which said alien shall come, or, if there be no collector at such port or district, then to the collector nearest thereto, by the master, agent, owner, or consignee of the vessel, transportation line, or other conveyance or vehicle bringing such alien to the United States.

SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who admit their belief in the practice of polygamy; anarchists, or persons who believe in, or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials; prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who are supported by or receive in whole or in part the proceeds of prostitution; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; persons hereinafter called contract laborers who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, expressed or implied, to perform labor in this country of any kind, skilled or unskilled; those who have been, within one year from the date of application for admission to the United States, deported as having been induced or solicited to migrate as above described; any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of

the foregoing excluded classes and that said ticket or passage was not paid for by any corporation, association, society, municipality, or foreign government, either directly or indirectly; all children under sixteen years of age unaccompanied by one or both of their parents, at the discretion of the Secretary of Commerce and Labor or under such regulations as he may from time to time prescribe: *Provided*, That nothing in this Act shall exclude, if otherwise admissible, persons convicted of an offense purely political, not involving moral turpitude: *Provided further*, That the provisions of this section relating to the payments for tickets or passage by any corporation, association, society, municipality, or foreign government shall not apply to the tickets or passage of aliens in immediate and continuous transit through the United States to foreign contiguous territory: *And provided further*, That skilled labor may be imported if labor of like kind unemployed cannot be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.

SEC. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. * * * *

SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act.

SEC. 6. That it shall be unlawful and be deemed a violation of section four of this Act to assist or encourage the importation or migration of any alien by promise of employment through advertisements printed and published in any foreign country; and any alien coming to this country in consequence of such an advertisement shall be treated as coming under promise or agreement as contemplated in section two of this Act. * * * *

SEC. 12. That upon the arrival of any alien by water at any port within the United States it shall be the duty of the master or commanding officer of the steamer, sailing or other vessel having said alien on board to deliver

to the immigration officers at the port of arrival lists or manifests made at the time and place of embarkation of such alien on board such steamer or vessel, which shall, in answer to questions at the top of said list, state as to each alien the full name, age, and sex; whether married or single; the calling or occupation; whether able to read or write; the nationality; the race; the last residence; the name and address of the nearest relative in the country from which the alien came; the seaport for landing in the United States; the final destination, if any, beyond the port of landing; whether having a ticket through to such final destination; whether the alien has paid his own passage or whether it has been paid by any other person or by any corporation, society, municipality, or government, and if so, by whom; whether in possession of fifty dollars, and if less, how much; whether going to join a relative or friend, and if so, what relative or friend, and his or her name and complete address; whether ever before in the United States, and if so when and where; whether ever in prison or almshouse or an institution or hospital for the care and treatment of the insane or supported by charity; whether a polygamist; whether an anarchist; whether coming by reason of any offer, solicitation, promise, or agreement, express or implied, to perform labor in the United States, and what is the alien's condition of health, mental and physical, and whether deformed or crippled, and if so, for how long and from what cause; that it shall further be the duty of the master or commanding officer of every vessel taking alien passengers out of the United States, from any port thereof, to file before departure therefrom with the collector of customs of such port a complete list of all such alien passengers taken on board. Such list shall contain the name, age, sex, nationality, residence in the United States, occupation, and the time of last arrival of every such alien in the United States, and no master of any such vessel shall be granted clearance papers for his vessel until he has deposited such list or lists with the collector of customs at the port of departure and made oath that they are full and complete as to the name and other information herein required concerning each alien taken on board his vessel; and any neglect or omission to comply with the requirements of this section shall be punishable as provided in section fifteen of this Act. That the collector of customs with whom any such list has been deposited in accordance with the provisions of this section, shall promptly notify the Commissioner-General of Immigration that such list has been deposited with him as provided, and shall make such further disposition thereof as may be required by regulations to be issued by the Commissioner-General of Immigration with the approval of the Secretary of Commerce and Labor: *Provided*, That in the case of vessels making regular trips to ports of the United States the Commissioner-General of Immigration, with the approval of the Secretary of Commerce and Labor, may, when expedient, arrange for the delivery of such lists of outgoing aliens at a later date: *Provided further*, That it shall be the duty of the master or commanding officer of any vessel sailing from ports in the Philippine Islands, Guam, Porto Rico, or Hawaii to any port of the United States on the North American Continent to deliver to the immigration officers at the port of arrival lists or manifests made at the time and place of embarkation, giving the names of all aliens on board said vessel.

SEC. 19. That all aliens brought to this country in violation of law shall, if practicable, be immediately sent back to the country whence they respectively came on the vessels bringing them. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came; and if any master, person in charge, agent, owner, or consignee of any such vessel shall refuse to receive back on board thereof, or on board of any other vessel owned or operated by the same interests, such aliens, or shall fail to detain them thereon, or shall refuse or fail to return them to the foreign port from which they came, or to pay the cost of their maintenance while on land, or shall make any charge for the return of any such alien, or shall take any security from him for the payment of such charge, such master, person in charge, agent, owner, or consignee shall be deemed guilty of a misdemeanor and shall, on conviction, be punished by a fine of not less than three hundred dollars for each and every offense; and no vessel shall have clearance from any port of the United States while any such fine is unpaid.

SEC. 20. That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. Such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that cannot be done, then the cost of removal to the port of deportation shall be at the expense of the "immigrant fund" provided for in section one of this Act, and the deportation from such port shall be at the expense of the owner or owners of such vessel or transportation line by which such aliens respectively came.

THE NEW FEDERAL JUDICIAL CODE.

Enacted March 3, 1911. Effective on January 1, 1912.

(*Note.*—It is impossible within limited space to set forth more than the organization and principal powers of the Federal Courts.)

I. DISTRICT COURTS.

The United States is divided into seventy-eight judicial districts, the number of districts in each State varying from one to four. In each of the districts there is a district court, presided over by a District Judge. In several of the districts there is provision for an additional District Judge. Every District Judge is required to reside in the district for which he is appointed. His salary is six thousand dollars per year, and he holds his office during good behavior.

The District Courts have original jurisdiction:

(1) Of all suits, of a civil nature, at law or in equity brought by the United States, or by any officer thereof, or between citizens of the same State claiming lands under grants from different States; or where the matter in controversy exceeds three thousand dollars and arises (1) under the Constitution or laws or treaties of the United States; (2) or between citizens of different States, or (3) between citizens of a State and foreign States, citizens or subjects.

(2) Of all crimes and offenses cognizable under the authority of the United States.

(3) Of all civil cases of admiralty and maritime jurisdiction.

(4) Of all cases arising under the postal laws.

(5) Of all suits at law or in equity arising under the patent, the copyright and the trade-mark laws.

(6) Of all proceedings in bankruptcy.

(7) Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

(8) Of all proceedings arising under any law regulating the immigration of aliens, or under the contract labor law.

II. CIRCUIT COURTS OF APPEALS.

There are nine judicial circuits of the United States, in each of which is a Circuit Court of Appeals, composed of three Judges. A judicial circuit embraces from three to twelve States. Several of the circuits have additional Circuit Judges. Each Circuit Judge receives a salary of seven thousand dollars per annum, and is required to reside within his circuit. He holds office during good behavior. The Chief Justice and Associate Justices of the Supreme Court are allotted among the circuits and are competent to sit as Judges of the Circuit Court of Appeals within their respective circuits.

The Circuit Courts of Appeals exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States District Court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court.

III. THE COURT OF CLAIMS.

The Court of Claims consists of a Chief Justice and four Judges, who hold office during good behavior. The salary of each Justice is six thousand dollars per annum, the Chief Justice receiving six thousand five hundred dollars. It holds an annual session at the City of Washington, beginning the first Monday in December and continuing as long as may be necessary. The Court has jurisdiction to hear and determine all claims (except for pensions) founded upon the Constitution of the United States, or any law

of Congress, upon any regulation of an Executive Department, upon any contract with the Government of the United States, or for damages in cases not sounding in tort in respect of which a party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable.

IV. THE COURT OF CUSTOMS APPEALS.

The Court of Customs Appeals consists of a Presiding Judge and four Associate Judges, who receive a salary of seven thousand dollars a year each. The President of the United States may, in case of a vacancy, inability or disqualification of one or two Judges, designate any United States Circuit or District Judge to act in his or their place.

This court exercises exclusive appellate jurisdiction to review by appeal final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgment and decrees of this court are final in all such cases.

V. THE SUPREME COURT.

The Supreme Court of the United States consists of a Chief Justice and eight Associate Justices. The Chief Justice receives a salary of fifteen thousand dollars a year, and each Associate Justice a salary of fourteen thousand five hundred dollars. They hold office during good behavior. The Supreme Court holds one term annually at the seat of government, commencing on the second Monday of October, and such adjourned or special terms as it may find necessary. The jurisdiction is exclusive as to all controversies of a civil nature where a State is a party, and as to all suits or proceedings against ambassadors, public ministers, or their domestics or domestic servants; and original, but not exclusive jurisdiction, of all suits brought by ambassadors, other public ministers or in which a consul or vice consul is a party. It has power to issue writs of mandamus to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State or an ambassador, or other public minister, or a consul, or vice consul is a party. A final judgment or decree in any suit in the highest court of a State may be re-examined, and reversed or affirmed in the Supreme Court upon a writ of error, where there is drawn in question the validity of a treaty, or statute of or an authority exercised under the United States, or the validity of a statute or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, treaties, or statutes of the United States. Such judgment shall have the same effect as if the case had originated in a court of the United States. Appeals may be taken direct to the Supreme Court from the district courts in any case involving the construction and application of the Constitution,

or the constitutionality of any law of the United States, or the validity or construction of any treaty, and in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States. The Circuit Court of Appeals may certify to the Supreme Court any questions or propositions of law concerning which it desires the instruction of that court for its proper decision, and in any case, civil or criminal in which the decree of the Circuit Court of Appeals is final, the Supreme Court may require the case to be certified to it for review. In all cases where the decree or judgement of the Circuit Court of Appeals is not made final under the provisions of this law, there shall be of right an appeal or writ of error to the Supreme Court where the matter in controversy shall exceed one thousand dollars. The right of appeal or writ of error to the Supreme Court extends also to the courts of Porto Rico, Hawaii, Alaska, the Philippine Islands and the District of Columbia.

Under Section 289 of the Code, it was provided that the Circuit Courts of the United States should be abolished upon the taking effect of the Act, and their records, journals, files, dockets, books and papers should be delivered to the district courts. All cases pending in the Circuit Courts were to be proceeded with in the district courts.

ANALYSIS OF FEDERAL INCOME TAX LAW.*

Approved October 3, 1913.

A. THOSE WHO ARE TAXED.

1. Every citizen of the United States (at home or abroad).
2. Every person residing in the United States, though not a citizen.
3. Incomes from property owned, and business, trade, or profession carried on in the United States by persons residing elsewhere.
4. Corporations, joint stock companies, or associations, and every insurance company, no matter how created or organized.
5. Income from business transacted and capital invested within the United States by foreign companies.

B. AMOUNT OF PERSONAL TAX.

(Normal tax.)

One per centum per annum, on net income of every individual.

(Sur-tax.)

- Plus 1 per cent. on that part of income between \$20,000 and \$50,000.
- Plus 2 per cent. on that part of income between \$50,000 and \$75,000.
- Plus 3 per cent. on that part of income between \$75,000 and \$100,000.
- Plus 4 per cent. on that part of income between \$100,000 and \$250,000.
- Plus 5 per cent. on that part of income between \$250,000 and \$500,000.
- Plus 6 per cent. on that part of income exceeding \$500,000.

C. INCOME TO INCLUDE.

Net income of a taxable person to include gains, profits and income derived from—

1. Salaries, wages, or compensations for personal service.
2. Professions, vocations, business, trade, commerce.
3. Sales or dealings in property, whether real or personal.
4. Interest, rent, dividends, securities, including income from but not the value of property acquired by gift, bequest, devise, or descent.

(a) Does not include proceeds of life insurance policies, paid upon maturity or upon death of insured.

(b) Corporations not permitted to accumulate undue surplus in order to decrease income of an individual that he may escape payment of surtax (regulated by Commissioner of Internal Revenue).

D. EXEMPTED FROM THE TAX.

1. Necessary expenses actually paid in carrying on any business, not including personal, living, or family expenses.
2. All interest paid within the year by a taxable person on indebtedness.
3. All national, State, county, school and municipal taxes paid within the year, not including those assessed against local benefits.
4. Losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise.

5. Debts due to the taxpayer actually ascertained to be worthless and charged off during the year.

6. Reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in business.

(a) In case of mines, not to exceed 5 per cent. of the gross value at the mine of the output for the year for which the computation is made.

(b) No deduction for expense of restoring property for which an allowance is or has been made under this item.

(c) No deductions allowed for any amount paid for new buildings, permanent improvements, or betterments.

7. Amounts received as dividends upon the stock or from the net earnings of any corporation, joint stock company, association or insurance company which is taxable upon its net income under this Act.

8. Amount of income, the tax upon which has been paid or withheld from payment at the source as provided under this Act.

(a) If not exceeding \$3,000 per annum, if indefinite or irregular as to amount or time of accrual, not to be deducted in personal return.

9. Interest upon obligations of a State or any political sub-division thereof, and upon the obligations of the United States or its possessions.

10. Salary of the present President of the United States during the term for which he has been elected, and of the Judges of the Supreme and inferior Courts of the United States now in office, and the compensation of all officers and employes of a State or any political sub-division thereof.

(a) Except when such compensation is paid by the United States Government.

E. EXEMPTIONS TO PERSONAL INCOMES.

1. Three thousand dollars per annum of each income.

2. Plus \$1,000 if the man (or woman) is married and living with his (or her) wife (or husband).

Note.—Only one deduction of \$4,000 shall be made from the aggregate income of both husband and wife living together.

F. DATE FOR MAKING RETURN, ETC.

1. Tax to be levied upon income accruing each preceding calendar year ending December 31.

(a) For 1913, only from March 1, during which part year only five-sixths of deductions are allowed.

2. Every person of lawful age having income of more than \$3,000 per annum to make return on March 1 (beginning March 1, 1914) of each year to the Collector of Internal Revenue upon a form, prescribed by the Commissioner of Internal Revenue with approval of the Secretary of the Treasury.

(a) Guardians, trustees, all persons, corporations, etc., acting in any fiduciary capacity shall make return for persons for whom they act.

I. Return made by one of two or more such guardians, etc., shall be sufficient.

II. Corporations, etc., having disposal of dividends, etc., shall withhold tax and make return for each individual.

Note 1.—No. tax to be withheld at source prior to November 1, 1913.

Note 2.—No return of income, not exceeding \$3,000 per annum, required.

Note 3.—In case of partnerships only individual held accountable for return.

Note 4.—No individual required to make return of his income taxed at source.

(b) Collectors may question verity of return. Appeal given to Commissioner of Internal Revenue.

3. Commissioner of Internal Revenue to notify the taxed person by June 1 of the amount of tax for which he or she is liable.

(a) Fraudulent returns and over-taxation may be corrected any time within three years.

4. Tax to be paid to the Government by June 30th.

(a) Add to tax unpaid after ten days, 5 per cent. and 1 per cent. per month thereafter until paid. (Except from estates of insane, deceased, or insolvent persons.)

(b) Tax on incomes taxed at source to be paid by corporation, etc., withholding the tax.

I. Persons making claims of exemptions must file a statement with the corporation withholding tax thirty days prior to day on which return of his income is due. (Penalty of \$300 for making false claim.)

II. Persons, firm, etc., making business of collecting interest of dividends by means of coupons, checks, or bills of exchange shall obtain license from the Commissioner of Internal Revenue. Not having such a license is a misdemeanor punishable by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both.

III. Provisions relating to taxing at source apply only to the normal tax.

G. PENALTIES.

1. For refusal or neglect to make return there is a penalty of not less than \$20 nor more than \$1,000.

2. A false or fraudulent return with intent to evade the law is held to be a misdemeanor punishable by a fine not exceeding \$2,000, or imprisonment exceeding one year, or both.

3. For a corporation, etc., to refuse or neglect to make return or to make a false return there is a penalty not exceeding \$10,000.

H. THE CORPORATION TAX.

Normal tax of 1 per cent. on entire net income accruing from all sources to every corporation, joint-stock company, or association, and every insurance company, and upon income from business transacted and capital invested in the United States by foreign corporations. This classification excludes:

1. Partnerships.
2. Labor, agricultural, or horticultural organizations.
3. Mutual savings banks not having a capital stock represented by shares.
4. Fraternal beneficiary societies, orders or associations.
5. Domestic building and loan associations.
6. Cemetery companies operated on the mutual plan.
7. Religious, charitable, scientific or educational organizations.
8. Business leagues, chambers of commerce, boards of trade, civic leagues.
9. Incomes from public utilities accruing to a State or a political subdivision thereof.

I. NET INCOME OF CORPORATIONS.

Net income of a corporation is to be derived by deducting from the gross income the following items:

1. Necessary expenses paid in maintenance of business, including rentals.
2. Losses not compensated for by insurance or otherwise, and a reasonable allowance for depreciation.

(a) In case of mines the allowance for ore depreciation not to exceed 5 per centum of gross value at the mine of the output for the year for which the computation is made.

(b) In case of insurance companies this includes net addition required by law to be made to reserve funds, and sums, other than dividends, paid within the year on policy and annuity contracts; Provided

I. Mutual fire insurance companies not required to return as part of income any portion of premium deposits returned to policyholders, payments for losses, expenses and reinsurance.

II. Mutual marine insurance companies may deduct from incomes amounts paid for reinsurance and amounts paid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof.

III. Life insurance companies not to include as income that portion of actual premium received which is paid back or credited to a policyholder.

3. Interest on indebtedness, not exceeding one-half of its bonded indebtedness and its paid-up capital stock outstanding.

(a) In case of indebtedness secured by collateral, the total interest paid may be deducted as a part of its expense of doing business.

(b) In case of bonds, etc., interest on which is guaranteed to be free of taxation, no deduction for the payment of the tax herein imposed shall be allowed.

(c) In case of bank or other financial institution this will include interest paid on deposits, etc.

4. All taxes imposed by the United States, or any State or Territory, or by the government of any foreign country.

(a) Deductions from gross domestic income of foreign companies to be computed in the same manner as for domestic companies.

J. DATE FOR CORPORATE RETURN, ETC.

1. Tax imposed for fiscal year ending December 31 (for 1913 only from March 1, during which year only five-sixths of income to be taxed).

(a) Any corporation, etc., may choose the end of any month for closing its fiscal year.

I. In which case notice should be given the collector thirty days prior.

II. Return to be made 60 days after the close of such fiscal year.

2. Return to be made under oath of the president or proper official of the

company, etc., to Collector of Internal Revenue on March 1 each year, except as noted in (a) of the preceding paragraph. Such return to show—

- (a) Capital stock.
- (b) Bonded and other indebtedness.
- (c) Gross income.
- (d) Necessary expenses.
- (e) All losses.
- (f) Interest paid on bonded indebtedness.
- (g) Taxes.
- (h) Net income.

These returns are public records, open to inspection only upon order of the President.

3. Assessments made and corporations, etc., notified by June 1 of the amount of tax required to be paid.

- (a) Fraudulent return or overtaxation to be corrected within three years.

4. Tax to be paid by June 30 of each year (or 120 days from date on which return is required to be made).

(a) If tax is not paid upon date due there will be assessed the sum of 5 per centum on the amount of the tax, plus interest of 1 per cent. per month to date of payment.

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PROVISIONS OF THE CONSTITUTION OF OREGON RELATING TO THE INITIATIVE, REFERENDUM AND RECALL.

Article IV, Sec. I: The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly and also reserve power at their own option to approve or reject at the polls any Act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety), either by the petition signed by five per cent. of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the gov-

error shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the State of Oregon." This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the Act submitting this amendment, until legislation shall be especially provided therefor.

Note.—The above section is an amendment to the original Constitution of the State of Oregon and was adopted by the people by vote of 62,024 for, to 5,668 against it, on June 2, 1902.

As to Local, Special, and Municipal Laws, and Parts of Laws.

SEC. 1a. The referendum may be demanded by the people against one or more items, sections, or parts of any Act of the legislative assembly in the same manner in which such power may be exercised against a complete Act. The filing of a referendum petition against one or more items, sections, or parts of an Act shall not delay the remainder of that Act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum nor more than fifteen per cent. to propose any measure, by the initiative, in any city or town.

Note.—The above section was proposed by initiative petition filed on February 3, 1906, and adopted by vote of the people, 47,678 for, and 16,735 against it, on June 4, 1906. It went into effect by proclamation of the Governor issued June 25, 1906.

Note.—In 1907, the Legislature of Oregon passed an Act which provides in detail the form and procedure to be followed in the exercise of the initiative and referendum powers of the people of the State. (Laws 1907, Chapter 226.)

The Recall.

ART. II. SEC. 18. Every public officer in Oregon is subject, as herein

provided, to recall by the legal voters of the State or of the electoral district from which he is elected. There may be required twenty-five per cent., but not more, of the number of electors who voted in his district at the preceding election for Justice of the Supreme Court to file their petition demanding his recall by the people. They shall set forth in said petition the reasons for said demand. If he shall offer his resignation, it shall be accepted and take effect on the day it is offered, and the vacancy may be filled as is provided by law. If he shall not resign within five days after the petition is filed, a special election shall be ordered to be held within twenty days in his said electoral district to determine whether the people will recall said officer. On the sample ballot at said election shall be printed in not more than two hundred words, the reasons for demanding the recall of said officer as set forth in the recall petition, and in not more than two hundred words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said special election shall be officially declared. Other candidates for the office may be nominated to be voted for at said special election. The candidate who shall receive the highest number of votes shall be deemed elected for the remainder of the term, whether it be the person against whom the recall petition was filed, or another. The recall petition shall be filed with the officer with whom a petition for nomination to such office should be filed, and the same officer shall order the special election when it is required. No such petition shall be circulated against any officer until he has actually held his office six months, save and except that it may be filed against a Senator or Representative in the legislative assembly at any time after five days from the beginning of the first session after his election. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected unless such further petitioners shall pay into the public treasury which has paid such special election expenses, the whole amount of its expenses for the preceding special election.

Note.—The foregoing amendment to the original Constitution of the State was proposed by the people by initiative petition and was approved by a vote of 58,381 for, and 31,002 against the amendment. It took effect by proclamation of the Governor on June 23, 1908.

KANSAS BLUE SKY LAW OF 1915.

(The following are the important sections.)

Sec. 2. It shall be hereafter unlawful for any person, copartnership, association, or corporation, hereinafter called the promoter, either as principal, or through brokers or agents, to sell or offer for sale or by means of any advertisements, circulars, or prospectus, or by any other form of public offering, to attempt to promote the sale of any speculative securities in this State, unless there first shall have been filed with the bank commissioner: (1) A copy of the securities so to be promoted; (2) A statement in substantial detail of the assets and liabilities of the person or company making

and issuing such securities and of any person or company guaranteeing the same, including specifically the total amount of such securities and of any securities prior thereto in interest or lien, authorized or issued by any such person or company; (3) If such securities are secured by mortgage or other lien, a copy of such mortgage or of the instrument creating such lien, and a competent appraisal or valuation of the property covered thereby, with a specific statement of all prior liens thereon if any; (4) A full statement of facts showing the gross and net earnings, actual or estimated, of any person or company making and issuing or guaranteeing such securities, or of any property covered by any such mortgage or lien; (5) All knowledge or information in the possession of such promoter relative to the character or value of such securities, or of the property or earning power of the person or company making and issuing or guaranteeing the same; (6) A copy of any general or public prospectus or advertising matter which is to be used in connection with such promotion, and no such prospectus or advertising matter shall be used unless the same has been filed hereunder; (7) The names, addresses and selling territory in this State of any agents by or through whom any such securities are to be sold, and no such agents shall be employed unless such statement with respect to them has been filed hereunder, and there shall have been paid to the bank commissioner a registration fee of one dollar for each such agent. The payment of such fee shall be payment in full of all fees for registration of such agent until and including the first day of March next following; (8) The name and address of such promoter, including the names and addresses of all partners, if the promoter be a partnership, and the names and addresses of the directors or trustees, and of any person owning ten per centum, or more, of the capital stock, if the promoter be a corporation or association; (9) A statement showing in detail the plan on which the business or enterprise is to be conducted; (10) The articles of co-partnership or association, and all other papers pertaining to its organization, if the securities be insured or guaranteed by a co-partnership or unincorporated association; (11) A copy of its charter and by-laws if the securities be issued or guaranteed by a corporation; (12) A filing fee of twenty-five (\$25.00) dollars.

SEC. 4. It shall be the duty of the bank commissioner as soon as is practical, to examine the statement and documents so filed, and if said bank commissioner shall deem it advisable, he shall make, or have made, a detailed inspection, examination, audit and investigation of the affairs of the makers or guarantors of such securities which said inspection, examination, audit, and investigation shall be at the promoter's expense. As a part of the aforesaid inspection, examination, audit and investigation, the bank commissioner may cause an appraisal to be made of the property of the maker or guarantor, including the value of patents, formulæ, good-will, promotion, and intangible assets and shall furnish a full and complete statement or report of his inspection and investigation aforesaid to the Charter Board. The Charter Board shall, within ten days thereafter, examine the statements or report, and give the promoter a hearing if he so desires. If the Charter Board finds no legal objection to the enterprise, or securities, it shall direct the bank commissioner to note in a book to be kept for the bank commissioner for that purpose that said person, co-partnership, association or corporation has complied with section 2 of this Act. But if, from the statements, papers and

documents on file, and the investigations and report of the bank commissioner, or from other evidence submitted, it shall appear, and the Charter Board shall find (1) that the makers or guarantors of said securities are insolvent, in failing circumstances, or are untrustworthy; (2) or that the promoter's plan of business is unfair, inequitable, dishonest, or fraudulent; (3) or that the promoter's plan of business does not adequately secure investors against the unlawful dissipation or misapplication of the funds of the enterprise or business; (4) or that the promoter's literature or advertising is misleading and calculated to deceive purchasers or investors; (5) or that the securities offered, or to be offered, or issued, or to be issued, in payment for property, patents, formulæ, good-will, or promotion and intangible assets in excess of the reasonable value thereof; (6) or that the enterprise or business of the promoter is unlawful or against public policy; (7) or is a mere scheme of a promoter or promoters to get rich quick at the expense of the purchasers of the aforesaid securities; the said Charter Board shall reduce its said findings to writing and attest the same by the signature of the chairman and secretary thereof. Notice of such finding, or findings, shall immediately be given to the applicant by registered mail. And it shall thereafter be unlawful for the promoter or any broker or agent of said promoter to sell, offer for sale, or by means of any advertisement, circular, or prospectus, or by any other form of public offering to attempt to promote the sale of any such speculative security or securities in this State.

SEC. 5. The Charter Board shall at any time have the authority and jurisdiction to investigate the affairs of any speculative enterprise, the securities of which are being sold or offered for sale in this State, and after giving the promoter a hearing, may if the evidence warrant, make any of the adverse findings enumerated in section 4 of this Act, and it shall thereafter be unlawful for any person, co-partnership, association or corporation to sell, offer for sale, or by means of any advertisement, circular, or prospectus, or by any other form of public offering to attempt to promote the sale of the securities of such speculative enterprise in this State.

SEC. 9. The general accounts of every person, co-partnership, association or corporation, issuing or guaranteeing any securities subject to the provisions of this Act, shall be kept in a business-like and intelligent manner and in sufficient detail so that the bank commissioner or his authorized representative can ascertain at any time the financial condition of such person, co-partnership, association or corporation, and the books of account and affairs of any such person, co-partnership, association or corporation, shall be subject to examination by the said bank commissioner or upon his direction by his assistants, accountants or examiners, at any time said bank commissioner shall deem it advisable, and in the same manner as is now provided for the examination of State banks; and such person, co-partnership, association or corporation shall pay a fee for each of such examinations, of not to exceed fifteen dollars (\$15.00) for each day or fraction thereof, plus the actual traveling and hotel expenses of said bank commissioner, assistant, accountant, or examiner, that he is absent from the capital of the State for the purpose of making such examination. And it is provided further, that every person, co-partnership, association or corporation making or guaranteeing any securities subject to the provisions of this Act, shall file at the close

of business December 31st, March 31st, June 30th, and August 31st, of each year, and at such other times as may be required by the bank commissioner, a statement, certified by the oath of some person having actual knowledge of the facts therein stated, setting forth, in such form as may be prescribed by said bank commissioner the financial condition, amount of property and liabilities of such person, co-partnership, association or corporation and such other information as said bank commissioner may require. Each statement shall be accompanied by a filing fee of two dollars and fifty cents (\$2.50). It shall be unlawful for any person, partnership, association, or corporation subject to the provisions of this Act, failing or refusing to comply with the provisions of this section within ten days after compliance is required, to thereafter sell or offer for sale in this State any speculative stock which said person, partnership, association or corporation is selling or offering for sale in this State.

SEC. 10. The bank commissioner shall have power upon reasonable notice either upon his own initiative or upon complaint of any responsible person, to make or have made such special inspection or investigation as he may deem necessary, in connection with the promotion, sale, disposal, or offering for sale or disposal in this State, of any certificates, shares, stocks, bonds, securities, contracts, or contracts or bonds for deeds, to determine whether the same constitute a violation of this Act or any other statute of this State, by any individual, co-partnership, corporation, or association, promoting, offering, selling or pledging the same; and the State bank commissioner, his assistants or deputy shall have the power to issue subpoenas and process compelling the attendance of any person and the production of any papers or books for the purposes of such investigation and examination, and shall have power to administer an oath to any person whose testimony may be required on such examination or investigation; and any person who shall refuse to obey any such subpoena or make answer to any competent and material question propounded to him by the State bank commissioner shall upon conviction in any court of competent jurisdiction be deemed guilty of a misdemeanor, and fined in any sum not exceeding five hundred dollars (\$500.00) or be punished by confinement in the county jail for not more than ninety days, or both such fine and imprisonment. Upon the conclusion of any such investigation, the bank commissioner may make findings of fact touching the matter or matters under investigation, and such findings shall be *prima facie* evidence of the truth of the matters therein found by the bank commissioner in any action, either civil or criminal, instituted under any of the laws or statutes of this State against the person, persons, partnership, corporation or association. The notice herein provided for may be given by registered letter mailed to the last known address of person or persons or corporations to be investigated and the bank commissioner's certificate shall be sufficient evidence of such notice and the mailing thereof.

MARYLAND JIM CROW LAW OF 1904.

SECTION 1. Be it enacted by the General Assembly of Maryland, That all railroad companies and corporations, and all persons running or operating cars or coaches by steam on any railroad line or track in the State of Maryland, for the transportation of passengers, are hereby required to provide separate cars or coaches for the travel and transportation of the white and colored passengers on their respective lines of railroad; and each compartment of a car or coach, divided by a good and substantial partition, with a door or place of exit from each division, shall be deemed a separate car or coach within the meaning of this Act, and each separate car, coach or compartment shall bear in some conspicuous place appropriate words, in plain letters, indicating whether it is set apart for white or colored passengers.

SEC. 2. And be it enacted, That the railroad companies and corporations and persons aforesaid shall make no difference or discrimination in quality of or convenience or accommodation in the cars, coaches or compartments set apart for white and colored passengers.

SEC. 7. And be it enacted, That the provisions of this Act shall not apply to employees of railroads, or to persons employed as nurses, or to officers in charge of prisoners, whether the said prisoners are white or colored, or both white and colored, or to the prisoners in their custody, nor shall the same apply to the transportation of passengers in any caboose car attached to a freight train, nor to parlor nor sleeping cars, nor through express trains that do no local business.

Note.—In *Hart vs. Maryland*, 100 Maryland, 595 (1905) it was held that this statute, insofar as it relates to interstate passengers is unconstitutional, because it is an exercise of the state police power involving a regulation of commerce between the States in a matter in which the power of Congress is exclusive, but the statute was held to be valid insofar as it applies to passengers whose journeys begin and end within the State, and that it must be construed as applying only to such passengers.

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